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In The Supreme Court of the United States

STEVEN PHAM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS DIEP PHAM, DECEASED, KINH B. PHAM, LA T. BUI, KHANH BA PHAM, BANG LE, MING NGOC HA, VU DUY NGUYEN, AND KIEU TRANG THI-DO,

Petitioners,

v.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the United States Court of Appeals for the Fourth Circuit, in drastically departing from the decisions of other United States Courts of Appeals which historically extend broad protection to innocent motorists through omnibus insurance statutes, results in unfairness to the motoring public by creating a substantial risk, if not a probability, that injured motorists across the nation will not be fully compensated for their injuries.

II. Whether the decision of the United States Court of Appeals for the Fourth Circuit, in drastically departing from the decisions of other United States Courts of Appeals which traditionally afford broad protection to innocent motorists under employers' business automobile insurance policies, results in unfairness to the motoring public by creating a substantial risk, if not a probability, that injured motorists across the nation will not be fully compensated for their injuries.

III. Whether the decision of the United States Court of Appeals for the Fourth Circuit, in drastically departing from the decisions of other United States Courts of Appeals which are virtually uniform in holding an insurer to its articulated choice of defenses to liability under a policy, results in unfairness to the nationwide motoring public by allowing an insurer to surprise an injured motorist by proffering a defense that could not be used in the home state of the injured motorist.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

1. *Pham v. Hartford Fire Insurance Co.*, 419 F.3d 286 (4th Cir. 2005).

STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered the judgment sought to be reviewed on August 23, 2005. On September 23, 2005, the court of appeals entered an order denying the Petitioners' motion to file a suggestion for rehearing en banc out of time. Jurisdiction to review on a writ of certiorari the Court of Appeals' judgment is conferred upon the United States Supreme Court by 28 U.S.C. § 1254(a).

PROVISIONS INVOLVED

Va. Code Ann. § 38.2-2204.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Virginia, the court of first instance, had jurisdiction over this case pursuant to 28 U.S.C. § 1332.

The Petitioners filed this action seeking to recover compensation for the death of Louis Diep Pham ("Pham"). Pham was a resident of Colorado, and was killed in an automobile accident in Denver, Colorado when the vehicle he was driving was struck by an automobile owned and being driven by Erwin Ovidid Guerra ("Guerra"). (A-2.) At the time of the accident in

early 1995, Guerra was a resident of Virginia, and was employed by OSP Consultants, Inc. ("OSP"), a Virginia corporation with its principal place of business in Virginia. (A-3.) OSP was in the business of furnishing fiber-optic cable installation services to cable companies throughout the United States. (*Id.*) In its business, OSP sent work crews from its Virginia headquarters to different locations nationwide. During such temporary assignments, OSP provided its crews with an apartment in which to live, and a weekly per diem allowance. (*Id.*)

At the time of the accident, Guerra had a regular, permanent position with OSP. (*Id.*) He was sent by OSP on a temporary assignment to Denver, where OSP was installing fiber-optic cable. (*Id.*) Guerra was paid his regular, weekly wages, and, in addition, was paid a weekly per diem allowance. (*Id.*) He was also furnished with free housing in OSP-provided apartments in Aurora, Colorado. (*Id.*) OSP maintained an office at the apartments it provided to its employees, and the employees would meet at that office to obtain their work assignments and transportation to the job sites. (*Id.*) While working in Denver, Guerra held the position of "lead laborer," and, as part of his employment responsibilities, he was required to drive OSP employees to and from the work site, to organize and to supervise his crew, and to act as liaison between the crew and OSP supervisors. (A-3 to A-4.)

OSP workers away on temporary assignment would usually socialize on the weekends. (A-4.) OSP permitted such employees to drink alcohol on the weekends. (*Id.*) OSP had a policy of giving its workers

in Denver a cash payment of $105 every Friday evening. (*Id.*) OSP did not permit its company-owned vehicles to be used by its employees after they completed their daily work assignments. (*Id.*) Consequently, it was necessary for at least some OSP employees to have other vehicles in order to obtain meals, groceries, and other necessities, and to engage in after-hours social activities. (*Id.*)

OSP had a policy of allowing certain employees to drive their personal automobiles when on temporary assignment, because OSP benefited from this arrangement by saving the considerable expenses associated with transportation fares, rental vehicles, and purchase and depreciation costs connected with using OSP's business automobiles for temporary assignments. (*See id.*) After he had worked on temporary assignment in Denver for some time, Guerra was given permission by OSP to return to his home in Virginia in order to get his personal automobile and to drive it back to Colorado. (*Id.*) OSP permitted Guerra to use his automobile in Colorado in order to obtain meals and other necessities for himself and other OSP employees, and to transport himself and other OSP employees to and from social activities. (*Id.*)

At 2 a.m. on a Sunday morning, after drinking and socializing with other OSP employees at a Denver restaurant, Guerra was driving a co-worker back to the OSP apartments in Guerra's personal automobile. (*Id.*) Guerra drove through a red light, and collided with the car being driven by Pham. All of the occupants of Pham's vehicle were seriously injured, and Pham later died as a result of his injuries. (*Id.*)

At the time of the accident, OSP was insured under a business automobile policy ("BAP") issued by Respondent Hartford Fire Insurance Company ("Hartford"). (A-5.) The BAP provided:

> **PART IV—LIABILITY INSURANCE**
> **A. WE WILL PAY**
>
> 1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance, or use of a covered auto.

(A-45.)

Of the nine possible categories of covered autos, OSP was insured under the "any auto" provision. (A-7, A-62, A-65.)

An employee using a covered auto could be an insured under the policy. (A-7.) The BAP defined an "insured" as follows:

> **D. WHO IS INSURED.**
>
> 1. You are an insured for any covered auto.
>
> 2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow except:

a. The owner of a covered auto you hire or borrow from one of your employees or a member of his or her household.

b. Someone using a covered auto while he or she is working in a business of selling, servicing, repairing or parking autos unless that business is yours.

c. Anyone other than your employees, a lessee or borrower or any of their employees, while moving property to or from a covered auto.

3. Anyone liable for the conduct of an insured described above is an insured but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own.

(A-7 to A-8, A-48 to A-49.)

The BAP's definition of an insured was expressly expanded by Hartford's Broad Form Endorsement ("BFE"). (A-8 to A-9.) The BFE explicitly extended the scope of insureds by adding a Subparagraph 4, as follows:

> **Paragraph D.—WHO IS INSURED of PART IV—LIABILITY INSURANCE** is amended to add:
>
> 4. Any employee of yours while using a "covered auto" you don't own, hire or borrow in your business or personal affairs.

(A-8 to A-9, A-70.)

OSP insured numerous employees' personal vehicles under the foregoing policy provisions, and paid a substantial premium to Hartford for such insurance, in order to save the substantial expenses associated with transportation fares, rental vehicles, and purchase and depreciation costs that would arise in having to use OSP's own business automobiles for temporary assignments. (A-77.)

The Petitioners initially filed an action against Guerra and OSP in Colorado state court. (A-2 to A-3.) Judgment was entered against Guerra, who was found to be at fault for the accident and Pham's resulting death. (A-2.) The Colorado court, however, determined that Guerra was not acting within the course and scope of his employment at the time of the accident, and granted judgment to OSP on that ground. (A-24 to A-27.) Because Guerra's personal automobile liability insurance was insufficient to satisfy the judgment obtained against him by the Petitioners, the Petitioners filed the present action against Hartford, contending that Guerra was insured in his own right under OSP's automobile liability policy. (A-85 to A-87, A-92 to A-96.) The Petitioners

contended that Guerra was an insured under the BFE because Guerra was an employee of OSP at the time of the accident, Guerra was operating a covered auto, and the covered auto that Guerra was operating was his own vehicle which was not owned, hired, or borrowed by OSP in its business or personal affairs. (A-9, A-89.) The Petitioners also asserted that, irrespective of the terms of OSP's policy, Guerra was a mandatory insured pursuant to the Virginia Omnibus Statute because OSP expressly gave him permission to return to Virginia to retrieve his personal automobile and to drive it to the job site in Colorado, and expressly gave him permission to use his automobile in Colorado to obtain meals and other necessities for himself and other OSP employees, and to transport himself and other OSP employees to and from social activities. (A-12.)

The Petitioners filed a motion for summary judgment in the district court, and Hartford filed a cross-motion. (A-15.) Hartford defended the Petitioners' claim on the basis that Guerra was not insured in his own right under OSP's BAP, despite the fact that the Respondent had theretofore offered as its sole defense to liability under the policy the assertion that Guerra was not acting within the scope of his employment at the time of the accident, and therefore, that there was no coverage because OSP was not liable under the doctrine of *respondeat superior*. (A-97 to A-98, A-99 to A-100.)

The district court concluded that Guerra was not an insured under OSP's automobile liability policy because he was off duty and in his personal car at the time of the accident, and because his conduct did not

involve the business or personal affairs of OSP at that time. (A-18 to A-27.) In so holding, the court rejected the Petitioners' argument that the words "in your business or personal affairs" in the BFE do not modify the word "using," but instead refer to the words immediately preceding that phrase, that is, a covered auto that was not owned, hired, or borrowed by OSP. (A-19 to A-20.) The court reached this conclusion in spite of the Virginia rule that an insurance contract must be construed in favor of coverage if the language is reasonably susceptible to the meaning urged by the insured, and in spite of the evidence that the intent of OSP was to provide standard liability insurance for its employees with respect to their personal cars, in order to induce its employees to drive their cars long distances while on temporary assignment for OSP, thereby saving OSP substantial sums for transportation fares, rental vehicles, and purchase and depreciation costs connected with using OSP's vehicles for temporary assignments.

The evidence also demonstrates that Hartford charged, and OSP paid, substantial premiums in order to provide automobile liability insurance to OSP's employees on their personal vehicles. (A-77.)

The district court also concluded that Virginia's Omnibus Statute did not provide coverage to Guerra as a mandatory insured, irrespective of the language of the BFE. (A-20.) The court held that the Omnibus Statute was irrelevant because OSP could not give Guerra permission to use a car which Guerra himself owned. (*Id.*) On these grounds, the district court denied the

Petitioners' motion for summary judgment, and granted Hartford's cross-motion. (A-21.)

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court, holding that Guerra was not an insured under the BFE of OSP's business automobile policy, and that Guerra was not an insured pursuant to the Virginia Omnibus Statute. With respect to the BFE, the court concluded that the policy language was unambiguous, and that it would require a strained construction of the provision to conclude that an employee of OSP was to be covered in his or her own automobile regardless of whether the employee was using the vehicle in the business or personal affairs of OSP. (A-9 to A-11.)

However, there was ample evidence raising a question as to the meaning of the BFE, given that OSP's purpose in purchasing that endorsement—and paying substantial premiums for it—was to persuade its employees to incur the expenses connected with driving their personal automobiles when assigned by OSP to an out-of-state project. In exchange for incurring these expenses, and saving OSP substantial costs, OSP's employees received automobile liability coverage on their personal vehicles similar to such insurance they could have purchased for themselves.

It is unreasonable to conclude that OSP and Hartford did not expect employees to use their personal automobiles, while on assignment at long distances from their homes, for purposes not involving the business or personal affairs of OSP. It is equally unreasonable to

conclude that OSP's employees did not expect to be covered by automobile liability insurance under these circumstances. Because the context in which the BFE was issued raises a reasonable question as to the meaning of that provision, the district court and the court of appeals were obligated to construe the provision in favor of insurance coverage. Rather, the courts below interpreted the provision as excluding Guerra as an insured *as a matter of law*. As discussed hereafter, the court of appeals' decision conflicts with the decisions of other courts of appeals on this question, and creates undue uncertainty and risks for the motoring public.

Regarding the Virginia Omnibus Statute, the Fourth Circuit noted that the statute extends mandatory liability insurance coverage to any person who uses, with the permission of the named insured, a motor vehicle insured in Virginia. (A-12.) However, the court concluded that this provision did not apply in the present case because OSP could not give Guerra permission to drive an automobile that was owned by Guerra himself. (A-13.) As discussed below, however, the court misapplied Virginia law in concluding that nonownership prevented OSP from giving permission to use the vehicle. More importantly, the court's decision conflicts with decisions of other courts of appeals as to the capacity of a driver to use permissively his or her own vehicle at the request of the named insured, for purposes of the application of an omnibus provision. This is a question of considerable consequence given the common situation in which employees are temporarily assigned to perform work at locations remote from the state in which a vehicle is insured.

The Fourth Circuit's decision conflicts with the understanding of other courts of appeals that an omnibus provision should be liberally construed to provide insurance coverage, if at all possible, in order to protect the reasonable expectations of the public with respect to full compensation for injuries suffered in automobile mishaps. The Fourth Circuit's decision in the present case both undermines this public policy and results in a substantial erosion of public confidence in our system of automobile liability insurance. For example, following the Fourth Circuit's decision, a member of the public involved in an automobile accident with a person who resides within the Fourth Circuit, and who has been assigned by his or her employer to work in the state where the accident occurred, has no assurance that the employee is covered for liability and will be able to respond in compensation for the injuries inflicted. The existence of liability coverage will not depend upon the general understanding, pursuant to omnibus insurance law, that the issuance of a liability policy means that an injured person is afforded the means to recover compensation regardless of who is using the vehicle or whether the vehicle is being operated within the course of the driver's employment, both circumstances beyond the knowledge and control of the injured person. Rather, the existence of liability coverage may depend upon an anomalous interpretation of omnibus insurance law which excludes coverage under the readily foreseeable circumstance in which an employer permits an employee to use the employee's personal automobile while on assignment for the employer.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION THAT GUERRA WAS NOT AN INSURED PURSUANT TO VIRGINIA'S OMNIBUS STATUTE CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS IN A MANNER THAT SUBJECTS THE ABILITY OF AN INJURED PERSON TO RECOVER FULL COMPENSATION TO THE VAGARY THAT THE HOME STATE OF A NATIONALLY ASSIGNED EMPLOYEE DOES NOT RECOGNIZE THE EMPLOYEE AS AN INSURED.

The Virginia Omnibus Statute, Va. Code Ann. § 38.2-2204(A), provides that no policy of automobile liability insurance shall be issued or delivered in Virginia to the owner of a motor vehicle, or upon a motor vehicle principally garaged or used in Virginia, unless the policy contains a provision insuring the named insured, and any other person using the vehicle with the express or implied consent of the named insured, against liability for death or injury sustained as a result of negligence in the operation of the vehicle. Thus, if applied in the case at bar, the Virginia Omnibus Statute would render Guerra an insured irrespective of the interpretation of the BFE in OSP's business automobile policy, and irrespective of whether Guerra was acting in the business or personal affairs of OSP at the time of the accident.

It is important that the Virginia Omnibus Statute distinguishes between the "owner" of a motor vehicle,

and the "named insured." While the owner and the named insured may be the same person, they need not be. That the Omnibus Statute now extends to nonownership policies is made clear by the Fourth Circuit's opinion in *Clarke v. Harleysville Mutual Casualty Co.*, 123 F.2d 499 (4th Cir. 1941), which was decided before the statute was enacted in its current form in 1986. When *Clarke* was decided, the Omnibus Statute provided that no policy shall be issued "to the owner of a motor vehicle" without coverage of a person using the vehicle with the permission "of such owner." *Id.* at 501. In light of this language, the court concluded that the statute did not apply to a nonownership policy covering only the insured employer's liability resulting from negligence of its employees for which the employer would be liable under the doctrine of *respondeat superior*. *Id.*

Under the Virginia Omnibus Statute in its present form, it is the permission of the "named insured" which triggers the mandatory liability coverage of a driver using the vehicle with expressed or implied consent. Hence, the Omnibus Statute operates to protect the public interest by providing a means of recovery for an injured person regardless of who is operating a motor vehicle, and whether the vehicle is being used within the driver's employment, so long as the driver is using the vehicle with the permission of the named insured. In a case like the one at bar, the Virginia Omnibus Statute serves to assure the public that an employee who is asked by a named-insured employer, like OSP, to use the employee's own vehicle while on assignment for the employer will be covered by liability insurance, even

when the employee is operating the vehicle for his or her personal purposes.

The Virginia Supreme Court has recognized the salutary purpose of the Omnibus Statute. In *Liberty Mutual Insurance Co. v. Tiller*, 189 Va. 544, 53 S.E.2d 814 (1949), the court held that the omnibus provision is for the benefit of a party who suffers damage from the negligent use of an insured's automobile when operated by another with the permission of the insured, and that every policy will be deemed to contain such a clause. The Omnibus Statute is remedial and must be liberally construed to serve the clear public policy of broadening the coverage of automobile liability insurance. *Fidelity & Casualty Co. of New York v. Harlow*, 191 Va. 64, 59 S.E.2d 872 (1950).

The Fourth Circuit has previously observed that the Omnibus Statute is to be liberally construed to serve the public policy manifested in the statute. *See American Automobile Insurance Co. v. Fulcher*, 201 F.2d 751 (4th Cir. 1953). Indeed, the other United States Courts of Appeals have similarly noted that an omnibus statute is remedial in nature, and has the purpose of protecting the public against damages caused by accidents arising from the negligent use of automobiles by noninsured permittees. *See Universal Underwriters Insurance Co. v. Wagner*, 367 F.2d 866 (8th Cir. 1966); *cf. Nationwide Mutual Insurance Co. v. Dunning*, 252 F.3d 712 (5th Cir. 2001) (purpose of omnibus clause includes protection of members of public generally from the negligent operation of an insured automobile on a public highway; any limitation on coverage under omnibus clause should be liberally

construed in favor of insurance coverage). The purpose of an omnibus statute is to fix the liability of additional insureds, and *to eliminate the ambiguities and defenses* with reference thereto as a matter of public policy. *Universal Underwriters Insurance Co.*, 367 F.2d at 873. The Fourth Circuit has held that, for purposes of the Virginia Omnibus Statute, whether a driver was using an automobile with the express or implied permission of the insured is a question of fact for the jury. *See Travelers Indemnity Co. v. Neal*, 176 F.2d 380 (4th Cir. 1949).

In the present case, the Fourth Circuit, relying upon *Stone v. Liberty Mutual Insurance Co.*, 253 Va. 12, 478 S.E.2d 883 (1996), held that OSP could not have given Guerra permission to drive a car that OSP did not own, but that was owned by Guerra himself. (A-13.) In so doing, the court not only ignored the plain language of the Virginia Omnibus Statute, which allows effective permission by a named insured who is not an owner, but it misinterpreted the Virginia law set forth in *Stone* and rendered a decision that necessarily undermines public confidence in, and protection under, the nationwide system of automobile liability insurance. In *Stone*, the Virginia Supreme Court answered a certified question by the Fourth Circuit as to the coverage of an insured corporation's employee while driving his own car as a pizza delivery person for the corporation. Although the issue in *Stone* was the extent to which the Virginia Uninsured Motorist Statute provided coverage under the omnibus provision of that statute, the court looked to the Virginia Omnibus Statute for guidance. The court observed that a named insured generally cannot give permission to use a vehicle that the named insured does

not own. 478 S.E.2d at 886. Nevertheless, according to the court, an exception exists *if the named insured has an interest in the vehicle sufficient to entitle him or her to possession and control of it. Id.*

The *Stone* court decided the case on a basis other than the employer's interest in the vehicle, however. The court noted that the omnibus provision of the Uninsured Motorist Statute does not contain language similar to that of the Virginia Omnibus Statute, which deems the permission of the owner to include the permission of the custodian of the motor vehicle. *Id.* In light of the absence of such language from the Uninsured Motorist Statute, the court concluded that the Uninsured Motorist Statute does not include nonowned vehicles, and that there was no basis for the employee, as the custodian of the vehicle, to give permission for the use of that vehicle. Consequently, the employee was not an insured entitled to uninsured motorist coverage. *Id.* The *Stone* court's holding makes clear, contrary to the holding of the Fourth Circuit, that the Virginia Omnibus Statute *does* extend liability coverage to nonowned vehicles, when the named insured has given permission to use such a vehicle.

The decision of the Fourth Circuit that an employer-named insured cannot give an employee permission to use, for employment purposes, an automobile owned by the employee conflicts with the decisions of other courts of appeals, which have found a sufficient interest on the part of the named insured to allow that person to give permission for the use of an automobile owned by the driver involved in the accident.

For example, in *Western Casualty & Surety Co. v. Herman*, 318 F.2d 50 (8th Cir. 1963), the court held that the named insured, a widowed mother, had the ability to give permission to use the insured automobile to her son, who owned the automobile. The insured automobile was involved in an accident while being driven by the owner-son. Accordingly, the son was covered under the omnibus clause, even though he was not named as an insured in the policy. *Id.* at 56. The court found that the mother had a sufficient interest in the insured vehicle to give her owner-son permission to use the vehicle because the mother requested that her son use the vehicle to provide her with necessary transportation. *Id.* at 54. In this regard, the court observed that the only insurable interest necessary to the validity of an automobile liability policy is that the insured may incur liability because of the operation or use of the vehicle. *Id.* With respect to permission, the court stated:

> At first blush it may appear anomalous to suggest that the owner of an automobile not named as an insured in a liability insurance policy may operate the automobile with "permission" of the named insured within the meaning of the "omnibus" clause of the policy. There is, however, a sharp conflict of authority on this question. *See* Appleman, *Insurance Law and Practice*, Vol. 7, § 4358, pp. 266- 268 (1962). The Missouri courts have not to our knowledge expressly ruled upon the precise question, but in light of the liberal construction of and the broad coverage

> granted under the "omnibus" clause in two cases decided by a Court of Appeals of Missouri, *Haynes v. Linder* (K.C.C.A.), 323 S.W.2d 505 (1959), and *Lajoie v. Central West Casualty Co.*, 228 Mo.App. 701, 71 S.W.2d 803, 814 (1934), we are not prepared to say that on the peculiar facts of this case the Missouri Supreme Court would hold that the "omnibus" clause did not provide coverage to the owner-driver of the insured vehicle.

Id.

Other United States Courts of Appeals have reached the same result. For instance, in *Quinnan v. New Hampshire Insurance Co.*, 97 F.3d 1460, 1996 WL 508654 (9th Cir. 1996), the court held that a person driving his own pickup truck at the request of his employer was a permissive user of the truck. Accordingly, the owner-employee was an insured under the omnibus statute. 1996 WL 508654, at *4.

To the same effect is *Ridgway v. Gulf Life Insurance Co.*, 578 F.2d 1026 (5th Cir.), *rehearing denied*, 583 F.2d 541 (5th Cir. 1978), in which the court ruled that the driver of an over-the-road truck, titled and registered in the driver's name, was using the truck with the permission of the named-insured trucking company to which the driver had leased the truck. Accordingly, the driver-owner was an insured under the omnibus provision of the policy:

As a matter of law, Holcombe was insured under the Gulf policy. The Texas Supreme Court has set out the pertinent principles of construction for this policy:

> (1) An insurance policy will be construed strictly against the insurer; (2) when the terms of an insurance contract are capable of two or more constructions and under one a recovery is allowable and under the other it is denied, the construction which permits recovery will be given the policy; (3) forfeitures of insurance coverage are not favored; and (4) if a fair and reasonable construction of an insurance contract will permit, a meaning will be given to its language that effectuates a contract of insurance rather than defeats it. *Kelley v. American Insurance Company*, 160 Tex. 71, 325 S.W.2d 370 (1959). This policy is strongest when considering words of exception and limitation. *Ramsay v. Maryland American General Ins. Co.*, 533 S.W.2d 344, 349 (Tex.1976).

> (a). Gulf first asserts that the section of its policy titled PERSONS INSURED excludes " . . (ii) the owner or lessee (of whom the

> named insured is a sub-lessee) of a hired automobile. . . ." However, the same section specifically includes as "insured" ". . . (c) any person while using an owned automobile or a hired automobile with the permission of the named insured (Barry), provided his actual operation or . . . his actual use thereof is within the scope of such permission . . . ."
>
> The court finds no necessary conflict between these two clauses. Gulf probably meant to eliminate coverage of the owner of a nonowned vehicle for some condition of the vehicle that might give rise to liability to a third party. Gulf undoubtedly meant to insure Holcombe in his capacity as an employee. Since this construction of the apparent clauses in conflict is reasonable, and since it would grant rather than deny coverage, the construction is therefore compelled by law.

578 F.2d at 1031; *see also Occidental Fire & Casualty Co. of North Carolina v. Brocious*, 772 F.2d 47 (3d Cir. 1985) (named insured gave permission to use vehicle to conditional owner of vehicle for purposes of liability coverage under the omnibus clause; insurer received premiums on policy with knowledge of arrangement between named insured and driver, and any uncertainties in policy had to be construed against

insurer); *Transport Indemnity Co. v. Paxton National Insurance Co.*, 657 F.2d 657 (5th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982) (for purposes of coverage under omnibus clause, agent of owner was permissive user of owner's truck under permission to drive vehicle granted by nonowner lessee); *Chevalier v. Reliance Insurance Co. of Illinois*, 953 F.2d 877 (5th Cir. 1992) (rehearing denied) (vehicle owner's employer borrowed employee-owner's truck when employee was hauling under contract with employer; therefore, employee was insured under omnibus clause in policy); *cf. Carolina Casualty Insurance Co. v. Transport Indemnity Co.*, 488 F.2d 790 (10th Cir. 1973) (named insured could give permission to use vehicle despite claim that, because vehicle was in exclusive possession of driver, such permission was not possible; accordingly, coverage existed under omnibus provision).

In the case at bar, the Fourth Circuit's decision that Guerra was not an insured under the Virginia Omnibus Statute conflicts with the foregoing decisions by other United States Courts of Appeals that a nonowner-named insured may give permission to use an automobile to the driver-owner, so as to trigger liability coverage of the driver under an omnibus provision.

The existence of liability coverage is especially important in circumstances like those of the present case, where an employee has been asked by his employer to use the employee's personal automobile in connection with a job assignment, in order to save the employer transportation and related costs. After the Fourth Circuit's decision, injured members of the public cannot be assured of compensation under the bedrock principle

of omnibus automobile liability coverage, which historically has provided the promise of compensation, to the greatest extent possible, irrespective of the identity or activities of the driver responsible for causing injuries.

The scenario presented by this case—an employee's use of his or her own automobile at the request of an employer who carries the automobile liability coverage for the employee—is by no means uncommon. The Fourth Circuit's decision means that compensation of injured persons pursuant to liability coverage will no longer be assured by the heretofore common understanding of omnibus insurance law, but may be unexpectedly negated by a business arrangement into which employers and employees residing in the Fourth Circuit may easily enter. The implications of this decision, and its conflict with the understanding of omnibus automobile liability coverage manifested by other United States Courts of Appeals, warrants action by this Court.

Accordingly, it is respectfully submitted that the Court should exercise its certiorari jurisdiction to correct the significant problems caused by the Fourth Circuit's decision.

II. THE FOURTH CIRCUIT'S DECISION THAT GUERRA WAS NOT AN INSURED UNDER OSP'S BUSINESS AUTOMOBILE POLICY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS IN A MANNER THAT SUBJECTS THE ABILITY OF AN INJURED PERSON TO RECOVER FULL COMPENSATION TO THE VAGARY THAT THE HOME STATE OF A NATIONALLY ASSIGNED EMPLOYEE DOES NOT RECOGNIZE THE EMPLOYEE AS AN INSURED.

The law of Virginia makes every rational intendment to effectuate the purpose of insurance, which is indemnity, and for that reason insurance policies are construed against the insurer. *E.g., Dressler v. Reserve Life Insurance Co.*, 200 Va. 689, 107 S.E.2d 406 (1959). The Fourth Circuit failed to apply this principle in concluding that Guerra was not an insured under OSP's BAP. The circumstances underlying OSP's purchase of the BFE, and its payment of substantial premiums therefor, included the desire of OSP to save transportation and related expenses by requesting that its employees take their personal automobiles on job assignments by OSP.

The consideration for the expenses incurred by the employees in doing so included automobile liability coverage on the employees' personal vehicles similar to such insurance they could have purchased directly. In light of these circumstances, the interpretation of the BFE advanced by the Petitioners is not unreasonable, and, pursuant to *Dressler*, should have been adopted by the

Fourth Circuit. At the very least, the court should have deemed the interpretation of this provision to be a question of fact. Instead, the Fourth Circuit found the provision to be unambiguous, and ruled as a matter of law Guerra was not an insured because he was not acting on behalf of his employer at the time of the accident. (A-10.)

The Fourth Circuit's decision as to the meaning of the BFE conflicts with those of other United States Courts of Appeals. For example, in *Pacific Employers Insurance Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270, 1274 (9th Cir. 1998), the court addressed an automobile liability policy providing for coverage of "any auto," as did OSP's BAP. An employee of Domino's Pizza was involved in an accident while driving his own car in order to perform his employment duties. The employee fell asleep at the wheel while driving home from work, and caused an accident resulting in one death and one serious personal injury. *Id.* at 1272. The court held that the business automobile policy at issue encompassed the employee's vehicle. *Id.* at 1275. In so holding, the court noted that public policy requires a broad interpretation of insurance contracts which favors coverage, and concluded that the employee's vehicle fell within the any-auto category and was, therefore, a covered automobile under the employer's automobile liability policy. *Id.* Similarly, in *Quinnan*, 1996 WL 508654, at *2, the Ninth Circuit held that the employer's automobile liability policy covering "any autos" included "nonowned autos," such as the employee's own truck which he was driving in connection with his employment at the time of the accident.

The Fourth Circuit's decision in the present case conflicts with the position taken by the Ninth Circuit in *Pacific Employers Insurance Co.* and *Quinnan.* Here, as in those cases, the BAP provided that a "covered auto" was "any auto." (A-62, A-65.) Moreover, here, as in those cases, an employee was involved in an accident while driving his personal vehicle in matters at least somewhat connected with the driver's employment. However, while the Ninth Circuit interpreted the BAPs at issue broadly and in favor of coverage, as Virginia law required in the case at bar, the Fourth Circuit, on facts largely indistinguishable from *Pacific Employers Insurance Co.* and *Quinnan,* decided to adopt a very narrow interpretation of OSP's BAP in concluding that Guerra was not an insured under that policy. Such an interpretation was not permissible under Virginia law, especially in light of the circumstances under which OSP induced its employees, including Guerra, to take their personal automobiles on job assignments and to use them while on assignment for all purposes for which personal automobiles are ordinarily used.

The conflict between the Fourth Circuit's decision and those of other United States Courts of Appeals creates an uncertainty for the public as to whether full compensation will be available for injuries incurred in automobile accidents. The universal rule, including in the Fourth Circuit, is that automobile liability insurance policies are to be construed broadly and in favor of coverage, as a means of protecting members of the public who are injured through the negligent operation of motor vehicles.

A uniform understanding and rule as to the scope of automobile liability coverage is especially important where, as here, an employer requests that its employees use their personal automobiles in connection with job assignments, and, in exchange, promises to provide liability insurance on the employees' personal vehicles. After the Fourth Circuit's decision, coverage is no longer assured under the traditional broad interpretation of automobile liability policies, and indeed, may be unexpectedly denied by a judicial interpretation rendered in a region remote from the location of a particular accident, and at odds with the law prevailing in the jurisdiction of the accident, and, in fact, generally. Accordingly, it is respectfully submitted that the Court should exercise its certiorari jurisdiction to correct the significant problems caused by the Fourth Circuit's decision.

III. THE FOURTH CIRCUIT'S DECISION THAT THE RESPONDENT DID NOT WAIVE ITS RIGHT TO OFFER THE DEFENSE THAT GUERRA WAS NOT AN INSURED UNDER OSP'S POLICY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS IN A MANNER THAT SUBJECTS THE ABILITY OF AN INJURED PERSON TO RECOVER FULL COMPENSATION TO THE VAGARY THAT THE HOME STATE OF A NATIONALLY ASSIGNED EMPLOYEE PERMITS A DEFENSE THAT WOULD NOT BE COGNIZABLE IN OTHER STATES.

Numerous United States Courts of Appeals have held that an insurer may waive defenses to coverage under a policy upon which it has not relied in its formal denial of coverage. *See, e.g., Valley Improvement Association v. United States Fidelity & Guaranty Corp.*, 129 F.3d 1108 (10th Cir. 1997); *Penn Mutual Life Insurance Co. v. Tilton*, 84 F.2d 10 (10th Cir. 1936) (insurer, in predicating repeated denials of coverage upon one stated ground, waived denial on other grounds); *cf. Interstate Cleaning Corp. v. Commercial Underwriters Insurance Co.*, 325 F.3d 1024 (8th Cir. 2003) (insurer is estopped to rely upon inconsistent defenses when it originally stated a specific defense to policy coverage). Insurers have a duty to investigate a claim promptly, and may be estopped from denying coverage if they withhold possible bases for denial of coverage. *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424 (9th Cir. 1995). An insurer may waive a defense to coverage by asserting another defense as

ground for its declination, provided that the insurer had knowledge of the facts giving rise to the unasserted defense. *See Luria Brothers & Co. v. Alliance Assurance Co.*, 780 F.2d 1082 (2d Cir. 1986), *on remand*, 1987 WL 10031 (S.D.N.Y. 1987). In fact, it has been held that the exclusion of evidence offered by an insured with respect to the insurer's waiver of policy defenses is reversible error. *See Charles Stores, Inc. v. Aetna Insurance Co.*, 428 F.2d 989 (5th Cir. 1970), *on remand*, 327 F. Supp. 525 (N.D. Miss. 1971), *appeal after remand*, 490 F.2d 64 (5th Cir. 1974).

In the case at bar, the Respondent insurer initially offered as its sole defense to liability under OSP's BAP the claim that Guerra was not acting within the course and scope of his employment at the time of the accident. (A-99, A-104.) Hartford refused to defend Guerra in the Colorado state-court action only on the ground that Guerra was not acting in the course and scope of his employment at the time of the accident, despite the fact that the Respondent was fully aware of the facts surrounding Guerra's use of his automobile in connection with his employment by OSP, of the terms of the policy it issued, and of the potential defense that Guerra was not an insured under the policy. (A-99 to A-100.) Nevertheless, Hartford chose not to offer such a defense to coverage.

The Petitioners' efforts in the state court litigation were thus directed toward establishing that Guerra was acting within the course and scope of his employment at the time of the accident. After allowing judgment to be entered against Guerra personally in Colorado state court, the Respondent later proffered the defense that

Guerra was not insured in his own right under OSP's policy. The Respondent's original and subsequent defenses are inconsistent, and the Petitioners were prejudiced by the Respondent's change in defenses because their efforts in the Colorado state court litigation were directed to proving that Guerra was acting within the course of his employment at the time of the accident.

The Petitioners argued to the Fourth Circuit that the Respondent's actions resulted in a waiver of additional defenses, and that Hartford should not be permitted to defend on the ground that Guerra was not an insured. The Fourth Circuit rejected this argument by addressing its decision to the question of whether Guerra was an insured.

The conflict between the Fourth Circuit's decision and those of other United States Courts of Appeals as to an insurer's waiver of policy defenses results in uncertainty to the public with respect to the ability to recover full compensation for injuries incurred in an automobile accident. If this matter had been litigated in the Tenth Circuit or in the circuits rendering the other decisions in conflict with that of the Fourth Circuit, the injured motorist would have received compensation under OSP's automobile liability policy because Hartford would not have been permitted to defend based on the only ground upon which it prevailed in the Fourth Circuit, i.e., Guerra's status as an insured under the policy. When a similar case arises in the future, the ability of an injured person in Colorado or in any state outside the Fourth Circuit to receive compensation under an automobile liability policy could turn on the mere

fortuity of whether or not the state for which the policy was written is within the Fourth Circuit. This type of uncertainty as to automobile liability coverage is undesirable as a matter of public policy in an environment in which employees are frequently assigned by their employers to out-of-state projects. For these reasons, it is respectfully submitted that the Court should exercise its certiorari jurisdiction to correct the significant problems caused by the Fourth Circuit's decision.

CONCLUSION

For all the foregoing reasons, the Petitioners respectfully request that this Honorable Court exercise its certiorari jurisdiction to correct the problems caused by the decision rendered in this matter by the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM W. MUHR
Attorney for Petitioners

NO._____

In The
Supreme Court of the United States

STEVEN PHAM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS DIEP PHAM, DECEASED, KINH B. PHAM, LA T. BUI, KHANH BA PHAM, BANG LE, MING NGOC HA, VU DUY NGUYEN, AND KIEU TRANG THI-DO,

Petitioners,

v.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

Appendix

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Steven PHAM, as personal representative of the estate of Louis Diep Pham; Kinh B. Pham, natural parent of Louis Diep Pham, deceased; La T. Bui, natural parent of Louis Diep Pham, deceased; Khanh Ba Pham; Bang Le; Minh Ngoc Ha; Vu Duy Nguyen; Kieu Trang Thi-Do,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY,

Defendant-Appellee.

No. 04-1520.

Argued Dec. 3, 2004.
Decided Aug. 23, 2005.

Background: After securing judgment against employee in underlying auto accident suit, estate of deceased motorist brought suit against business auto insurer of employer, seeking satisfaction of judgment on ground that employee was insured under policy. The United States District Court for the Eastern District of Virginia, Gerald Bruce Lee, J., entered summary judgment for insurer, and estate appealed.

Holding: The Court of Appeals, Widener, Circuit Judge, held that employee was not insured person under policy at time of accident.

Affirmed.

ARGUED: William Wayne Muhr, Colorado Springs, Colorado, for Appellants. Thomas Sykes Schaufelberger, Wright, Robinson, Osthimer & Tatum, Washington, DC, for Appellee. **ON BRIEF:** Richard A. Dezio, Alexandria, Virginia, for Appellants. Paul A. Fitzsimmons, Wright, Robinson, Osthimer & Tatum, Washington, DC, for Appellee.

Before WIDENER and WILKINSON, Circuit Judges, and MOON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge WIDENER wrote the opinion, in which Judge WILKINSON and Judge MOON concurred.

OPINION

WIDENER, Circuit Judge.

The plaintiffs appeal the district court's denial of their motion for summary judgment and grant of the defendant, Hartford Fire Insurance's, cross-motion for summary judgment. The issue presented to the district court was whether Erwin Guerra was an insured person for purposes of coverage pursuant to his employer's business auto insurance policy. In this action seeking insurance policy coverage of a claim stemming from a fatal car accident, which was caused by Guerra, the plaintiffs argue that Hartford should satisfy to the policy limit the judgment they received against Guerra in the Denver District Court, a Colorado state court. They

argue that he is an insured under his employer's business auto policy.

Because we decide Guerra was not an insured under his employer's business auto policy at the time of the accident, we affirm the judgment of the district court.

I.

Guerra was employed by OSP Consultants, Inc., a Virginia corporation with its principal place of business in Virginia, that provided fiber-optic cable installation services to cable companies throughout the country. OSP sent work crews from its headquarters in Virginia to work on temporary assignments installing the fiber-optic cable. During temporary assignments, OSP provided its work crews with an apartment in which to live and a weekly per diem allowance.

In early 1995, while working in a regular permanent position with OSP, Guerra accepted a temporary assignment in Denver. In addition to weekly pay, Guerra received the weekly per diem allowance and free housing in OSP-provided apartments. OSP maintained an office at the apartments and OSP employees would meet there to obtain their work assignments and transportation to the job sites.

While working in Denver, Guerra held the position of "lead laborer." In this position, he drove OSP employees to and from the job site, organized and supervised his crew, and acted as liaison between the

crew, many of whom were foreign nationals, and OSP supervisors.

OSP workers and supervisors occasionally met on weekends at local night spots to eat, drink and socialize. OSP allowed its employees to drink alcohol on the weekends. Further, OSP had a policy of giving its workers in Denver a cash payment of $105 every Friday evening. OSP did not allow company-owned vehicles to be used by OSP employees once the daily work assignments were completed.

After working on OSP's Denver job for some time, Guerra returned with the permission of his employer to his home in Virginia to obtain his own auto. He was one of about three OSP employees who was given permission to have his car in Colorado. Guerra used his car to obtain groceries and other necessities for himself and his coworkers. He also transported OSP employees to social gatherings.

At 2:00 a.m. on a Sunday morning, after drinking and socializing with other OSP employees at a local Denver nightspot, Guerra and a co-worker stopped to eat. Guerra then commenced to drive his co-worker back to the OSP apartments. While en route to the apartments, Guerra drove his 1985 Volvo station wagon through a red light and collided with a 1995 Nissan Maxima that had entered the intersection. The occupants of the Nissan were seriously injured in the accident. The driver of the Nissan later died from his injuries.

The plaintiffs filed a civil action in the Denver District Court naming Guerra and OSP as defendants. OSP was dismissed from the case with a judgment on the merits in its favor because the court rejected the plaintiff's theory of respondent superior since Guerra was off duty and not acting within the scope of his employment at the time of the accident. The plaintiffs then settled with Guerra and obtained a judgment against him in the amount of $1,558,707.78 plus 9% interest per annum on the judgment. The plaintiffs attempted to satisfy this judgment, but were unable to reach funds beyond the limits of Guerra's personal auto insurance policy.

The plaintiffs now seek to have the judgment against Guerra paid by Hartford to the limits of the policy because the plaintiffs allege Guerra is an insured person under OSP's business auto insurance policy.

II.

We review *de novo* the district court's decision to grant Hartford's cross-motion for summary judgment. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir.1988). We view the evidence in the light most favorable to the nonmoving party. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir.2002). Accordingly, the questions before us on *de novo* review are whether any genuine issues of material fact exist for the trier of fact, and if not, whether Hartford was entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

A.

In this diversity case, the district court correctly applied the law of Virginia, the forum State and the State in which the contract of insurance was made. According to Virginia law:

> At the outset, it must be conceded that an insurance company may provide in its contract of insurance, terms, provisions, and conditions not in violation of law and not inconsistent with public policy. It may provide for the amount to be paid, and the risk or hazard assumed. It may charge an increased premium for certain assumed risks, and may exclude from the contract risks not assumed. Its terms, provisions and conditions are to be considered the same as in other contracts subject, of course, only to provisions of law affecting insurance contracts. The courts have neither the duty nor the power to make the contracts. It is only their function to construe them. When the terms and provisions are clear, there must be given to such terms and provisions the construction and effect consonant with the apparent object. The contract of insurance is to be considered and construed as a whole. *Collins v. Metropolitan Life Insurance Company*, 163 Va. 833, 178 S.E. 40; 14 R.C.L. 926.

Darden v. N.A. Benefit Ass'n, 170 Va. 479, 197 S.E. 413, 415 (1938).

The policies at issue include a Virginia Business Auto Policy and a Broad Form Endorsement. Part IV(A) of the Virginia Business Auto Policy provides:

> WE WILL PAY.
>
> 1. we will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto. JA 341.

Of the nine potential categories of described covered autos in the policy, OSP was covered under "ANY AUTO." JA 345, 346.

For an employee using a covered auto to be covered under the policy, that employee must also qualify as an "insured," as written in the Hartford policy under Part IV, LIABILITY INSURANCE, and under the amendment to Part IV contained in the Broad Form Endorsement. Part IV(D) of the Business Auto Policy provides:

> WHO IS INSURED.
>
> 1. You are an insured for any covered auto.

2. Anyone else is an insured while using a covered auto you own, hire or borrow except:

a. The owner of a covered auto you hire or borrow from one of your employees or a member of his or her household.

b. Someone using a covered auto while he or she is working in a business of selling, servicing, repairing or parking autos unless that business is yours.

c. Anyone other than your employees, a lessee or borrower or any of their employees, while moving property to or from a covered auto.

3. Anyone liable for the conduct of an insured described above is an insured but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own. JA 341.

A Broad Form Endorsement amended "Who Is Insured" under Part IV, paragraph D of the Virginia Business Auto Policy to add:

> 4. Any employee of yours while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs. JA 348.

Pursuant to PART 1A of the Hartford Business Auto Policy, "you," "your" and "yours" refer to OSP. JA 340, 388.

B.

We first address the plaintiffs' contention that the district court erred in its holding that Guerra was not an "insured" under the language of Hartford's Broad Form Endorsement contract.

The plaintiffs argue that the amendment to the Business Auto Policy provides broader coverage to employees than they had under the original policy. Specifically, the plaintiffs claim that under the original policy, Part IV(D), an OSP employee would qualify as an "insured" only if he or she was using, with OSP's permission, a covered auto that OSP "owned, hired or borrowed." Br. p. 22. The argument goes that an OSP employee using his own auto in Denver at OSP's request and with OSP's permission, would not be an "insured" under the original Business Auto Policy. But, under the Broad Form Endorsement, the plaintiffs argue, the Business Auto Policy was modified to provide insurance to OSP employees using their personal autos.

The Broad Form Endorsement amended Part IV(D), "WHO IS INSURED" to add:

> 4. Any employee of yours while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs.

Plaintiffs construe the words "in your business or personal affairs" to relate to the words "covered auto" and not to the use by the driver thereof in the "business or [ ]personal affairs" of OSP. Thus, they claim coverage for such an OSP employee driving his own car "as long as he negligently uses the covered auto and causes injuries to innocent third parties." Br. p. 23.

We disagree. In our opinion, such is a strained construction because it omits the plain requirement of using the auto in the business or personal affairs of OSP. The plain meaning of this provision of the Broad Form Endorsement is clear and unambiguous. Reasonably construed, it does not lend itself to the interpretation of the plaintiffs. Under the Broad Form Endorsement, an employee is covered, even in an auto that OSP does not own, hire, or borrow, so long as the employee is engaged in OSP's business or OSP's personal affairs. By his own admission, Guerra was not acting on behalf of his employer at the time of the accident. In his deposition, Guerra testified, "They [OSP] have nothing to do with this. I was driving my car, after business hours, and I was driving--and I was drinking. It was something that happened to me when I was off of work." When asked, "Did this have anything to do with your job, going into this bar," Guerra answered, "No." Guerra was driving his personal auto while off duty at the time of the accident. Therefore, Guerra is not an insured under OSP's policy

with Hartford Insurance because he was not acting in OSP's business or OSP's personal affairs.

C.

Even if plaintiffs claim coverage under item THREE of the policy declarations, symbol 9, which is not listed under item TWO of the declarations, see JA 345 and 346, the result is the same. A subcategory of "ANY AUTO" in the policy declarations is "NONOWNED AUTOS ONLY." The definition of "NONOWNED AUTOS ONLY" provides:

> Only those autos you do not own, lease, hire or borrow which are used in connection with your business. This includes autos owned by your employees or members of their households but only while used in your business or your personal affairs.[1]

Thus, an auto not owned by OSP but by one of its employees such as Guerra, could be covered "only while used in [OSP's] business or [OSP's] personal affairs." For the same reasons as stated above, no such use was involved here. Because his personal auto was not a "covered" auto at the time of the accident, the Hartford policy does not cover Guerra as an insured.

---

[1]We note the similar and consistent wording of the amendment to Part IV(D) of the Broad Form Endorsement. See JA 346 and JA 348.

D.

The Virginia Omnibus Statute, Va.Code § 38.2-2204, requires that insurance coverage be provided to any driver given permission to drive an auto by the named insured (or responsible person). Here, Guerra was driving his own auto, not OSP's, at the time of the accident. Accordingly, the Omnibus Statute simply does not apply to extend coverage to Guerra.

The plaintiffs argue that the Omnibus Statute provided liability coverage to Guerra in two ways: (1) as an owner of his auto that was issued liability coverage; and (2) as any person "using" a covered auto with the expressed or implied permission of the named insured.

The Supreme Court of Virginia has answered a certified question of Virginia law from this court regarding the Omnibus Statute in *Stone v. Liberty Mutual Ins. Co.*, 253 Va. 12, 478 S.E.2d 883 (1996). The question involved "statutory interpretation and a motor vehicle insurance coverage issue" which arose in that case from an uninsured/underinsured motorist endorsement to an insurance policy. *Stone*, 478 S.E.2d at 883. In *Stone*, the court discussed the Omnibus Statute as follows:

> When construing such language, we repeatedly have held that a named insured generally cannot give permission to use a vehicle that the named insured does not own. For example, in *Nationwide Mut. Ins. Co. v. Cole*, 203 Va. 337, 341, 124 S.E.2d 203, 206 (1962), the Court said that "in order for

> one's use and operation of an automobile to be within the meaning of the omnibus coverage clause requiring permission of the named insured, the latter must, as a general rule, own the insured vehicle or have such an interest in it that he is entitled to the possession and control of the vehicle and in a position to give such permission." Accord *Virginia Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 343, 46 S.E.2d 377, 380 (1948).

Stone, 478 S.E.2d at 886.

The district court correctly concluded that OSP could not give Guerra permission to drive an auto that it did not own, but was owned by Guerra himself. See *Stone*, 478 S.E.2d at 886. Therefore, because Guerra was driving an auto that he owned himself, rather than an auto owned by OSP, the Omnibus Statute does not apply. The plaintiffs' claim that Guerra was an insured under the Hartford policy fails here, as well.

III.

We uphold the district court's finding that Guerra was not an insured person under the Hartford Policy because his use at the time of the accident did not involve the business or personal affairs of OSP. We are also of opinion that because Guerra was driving his own auto at the time of the accident, the Omnibus Statute does not apply.

The district court's grant of summary judgment to Hartford was proper.

Accordingly, the judgment of the district court is *AFFIRMED.*[2]

---

[2]Because we find that Guerra was not an insured under the Hartford policy, any other issues argued on brief by the plaintiffs are not addressed.

FILED
MAR 24
U.S. DISTRICT COURT
ALEXNADRIA,

IN THE UNITED STATES STRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA 1 ALEXANDRIA DIVISION

STEVEN PHAM, et al.,	)	
	)	
Plaintiffs,	)	CASE NO. 03-1316-A
	)	
v.	)	
	)	
HARTFORD FIRE INSURANCE CO.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. The issue presented is whether Mr. Guerra is an insured person for purposes of coverage pursuant to his employer's business auto insurance policy. This is a declaratory, judgment action seeking insurance policy coverage of a claim stemming from a fatal car accident. Mr. Erwin Guerra caused the fatal car accident while he was off-duty and in his personal car. The Plaintiffs, who are victims of the car

accident, seek to hold the Defendant insurance company, the insurance carrier of Mr. Guerra's employer, liable for an unpaid judgment Plaintiffs obtained against Mr. Guerra. The Plaintiffs argue that Hartford should pay for the judgment it received in Colorado District Court against Mr. Guerra because he is an insured under OSP's business auto policy. However, the Court concludes that Mr. Guerra is not an insured under OSP's insurance policy because at the time of the accident, he was off-duty, in his personal car, and was not acting on behalf of OSP's business or personal affairs.

I. BACKGROUND

Plaintiffs are the representatives of a victim and the victims of a car accident caused by Mr. Erwin Guerra. Mr. Guerra, after an evening of drinking and dancing, drove his car at 2;00 a.m. on a Sunday' morning through a red light and struck the car in which Plaintiffs. were traveling. At the time of the accident, Mr. Guerra was an employee of DSP Consultants, Inc. ("OSP"), on temporary assignment in Colorado. Defendant, Hartford Fire Insurance Co. ("Hartford"), is the insurance company that issued a business auto policy to OSP.

Plaintiffs filed a civil action in Denver District Court naming Mr. Guerra and DSP as Defendants. OSP was dismissed from the case on a motion for summary judgment because the court rejected Plaintiffs' theory of *respondeat superior* since Mr. Guerra was off duty and not acting within the scope of employment at the time of the accident. Thereafter, Plaintiffs settled with Mr. Guerra and obtained a judgment against him in the amount of

$1,558,707.78 plus interest. Plaintiffs attempted to satisfy this judgment, but were unable to reach funds beyond the limits of Mr. Guerra's personal auto insurance policy. Plaintiffs now seek to have the judgment against Mr. Guerra paid by Harford because it alleges that Mr. Guerra was an insured person under OSP's business auto insurance policy.

II. DISCUSSION

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment will be granted if it is shown that there is no genuine issue of material fact and the moving party is entitled to Judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1956). Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party is entitled to judgment as a matter of law unless a fair-minded jury could return a verdict for the nonmoving party on the evidence presented. *Id.* at 247-48. In order to successfully oppose a motion for summary judgment, the nonmoving party is required to make a showing sufficient to establish the existence of an essential element

to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp.*, 477 U. S. at 322.

B. Analysis

The Court finds that the Defendant is entitled to judgment as a matter of law on Plaintiffs' claim of breach of insurance contract because Mr. Guerra is not an insured under OSP's business auto policy since he was off duty and in his personal car at the time of the accident. Plaintiffs' theory is that the Defendant breached its insurance contract with Mr. Guerra, as an insured, by not agreeing to indemnify him against claims that arose as result of the accident in December of 1945. Plaintiffs argue that they are assignees of Mr. Guerra's rights under the contract and as such, they are entitled to receive funds equal to the amount outstanding on the judgment to be paid by Hartford. The issue with Plaintiffs theory is that OSP's insurance contract defines an insured person as one who is acting on behalf of- OSP's' busineess and personal affairs. At the time of the accident, Mr. Guerra was leaving a bar, was off duty, and in his personal car. Accordingly, he is not an insured person under the terms of OSP's business auto policy because he was not acting on behalf of OSP's business or personal affairs. Therefore, Hartford is not responsible for the iudgment entered in favor of the Plaintiffs and against Mr. Guerra.

1. Mr, Guerra is not an "insured" person under OSP's policy

Mr. Guerra is not an insured person for purposes of coverage pursuant to OSP's insurance policy because

his conduct did not involve the business or personal affairs of OSP. The dispositive issue is whether Mr. Guerra is an insured person for purposes of coverage under his employer's business auto insurance policy, where at the time of the accident he was off duty and in his personal car. Construction of the meaning of an insurance contract beams with the language of the contract. Where the language of the contract is unambiguous, the words are afforded the plain meaning that a reasonable person would give to them. *See TM Delmarva Power, L.L.C. v. NCF of Virginia, L.L.C.*, 263 Va. 116, 557 S,E.2d 199 (2002). The question of ambiguity must be determined by looking towards the face of the agreement. *See Stonega Cole & Coal Co., v. Louisville & N.R. Co.*, 106 Va. 223, 55 S.E. 551 (1906). Additionally, unambiguous contract language is not rendered ambiguous by the competing interpretations given it during litigation. *Douglas v, Hammett*, 28 Va. App. 517, 507 S.E.2d 98 (1998).

The Commercial Automobile Broad Form Endorsement modifies the "Who Is Insured" section of the Business Auto Policy to read: "Any employee of yours while using a covered 'auto' you don't own, hire or borrow in your *business or your personal affairs.*" (Plaintiffs' Exhibit D) (emphasis added). The language of this contract is not ambiguous. It means that an employee is covered, even in an auto that OSP does not own, hire, or borrow, so long as the employee is engaged in OSP's business or personal affairs. It is clear from the facts of this case that Mr. Guerra was not engaged in OSP's business or personal affairs. On the contrary, Mr. Guerra was driving hiis personal car while off duty at the time of

the accident. Therefore, Mr. Guerra is not an insured person for purposes of coverage pursuant to OSP's policy with Hartford Insurance.

2. Virginia's Omnibus Statutes is not relevant to the question of whether Mr. Guerra is an insured

The Virginia Omnibus Statute, Va. Code § 38.2-2204, is not relevant to the issue of whether Mr. Guerra is an insured person for purposes of coverage pursuant to OSP's policy with Hartford because the statute simply requires Virginia insurance policies to provide coverage to persons who are driving an insured automobile with the consent of the named insured. Indeed,OSP's business auto insurance policy has such a provision, which states in pertinent part: "Anyone else is an insured while using with your permission a covered auto you own, hire or borrow." (*See* Plaintiffs' Exhibit A; Part IV Paragraph D of Liability Coverage). Plaintiffs interpret the statute as requiring Hartford to give coverage to Mr. Guerra because he used his own car with OSP's permission. This interpretation is not one with which the court can agree. OSP did not own "the car in which Mr. Guerra was driving. Accordingly, it could not and did not give permission for Mr. Guerra to use his own car. Thus, the Virginia Omnibus Statute cannot be read to give coverage to Mr. Guena as an insured person.

III. CONCLUSION

Defendant's are not obligated to indemnify Mr. Guerra or to pay the renaining balance of the judgment

entered in favor of the Plaintiffs and against Mr. Guerra. At the time of the accident, Mr. Guerra was off duty and in his personal car; therefore, he is not an insured for purposes of coverage and OSP's business auto insurance policy. Furthermore, the Virginia Omnibus Statute cannot be read to give the Plaintiffs rights under OSP's business auto insurance policy because Plaintiffs interpretation of the statute is not in keeping with the purpose of the statute and OSP could not give permission to use a car that it does not own, hire, or borrow. For the foregoing reasons and for the reasons stated in open court on March 19, 2004, it is hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED, it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment is GRANTED.

The Clerk is directed to forward this Order to counsel record.

ENTERED this *24th* day of March, 2004.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
3/24/04

FILED
MAR 24
U.S. DISTRICT COURT
ALEXNADRIA,

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

STEVEN PHAM, et al.,	)	
	)	
Plaintiffs,	)	CASE NO. 03-1316-A
	)	
v.	)	
	)	
HARTFORD FIRE INSURANCE CO.,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to tae Court's order dated March 24, 2004, wherein the Court granted the Defendant's Cross-Motion for Summary Judgrett, the Court hereby

ORDERS the Clerk to enter JUDGMENT in favor of Defendant Hartfard Fire Insurance Co., and against Plaintiffs Steve Pham, Kinh E. Pham, La T. Bui, Khanh Ba Pham, Bang Le, Minh Ngoc Ha, Vu Duy Nguyen, and

Kieu Trang Thi-Do, pursuant to Rule 58 (a) of the Federal Rules of Civil Procedure. This case is hereby DISMISSED.

The Clerk is directed to forward a copy of this Order to counsel.

ENTERED this *24th* day of March, 2004.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
3/24/04

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
Civil Action No. 96CV765 Courtroom 18

ORDER

STEVEN PHAM, as personal representative of the estate of LOUIS DIEP PHAM, KINH B. PHAM and LA T. BUI, natural parents of LOUIS DIEP PHAM, deceased; KHANH BA PHAM; BANG LE; MINH NGOC HA; and VU DU NGUYEN; KIEU TRANG THI-DO,

Plaintiffs,

v.

ERWIN OVIDID GUERRA, ANGEL CHACON, individually and ANGEL CHACON, d/b/a LA TROPICANA INCORPORATED, OSP CONSULTANTS, INC., and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMMPANY,

Defendants.

The parties have stipulated and ageed that there are no material disputed issues of fact and that a determination should be based on the briefs submitted by the parties.

Defendant Guerra, a resident of Virginia, was employed by OSP Consultants, Inc. (OSP). He was in

Denver on a temporary assignment at the request of OSP. OSP provided film with a company-paid apartment to live in and a weekly stipend for food while on temporary assignment. On December 2, 1995, between 8 p.m. and 9 p.m. Guerra and another OSP employee drove to a Denver nightclub known as the Tequila Club. They drank beer and danced until approximately 2 a.m. at which time they left to drive back to their company provided apartment. While driving back to the apartment, Guerra ran a red light and collided with the Plaintiff's' vehicle. The Plaintiffs have asserted a claim against OSP Consultants, Inc. under a theory of respondeat superior.

OSP argues that it is not liable to the Plaintiffs because at the time of the accident Guerra was outside his scope of employment. Factors to be considered in determining whether an employee was within the scope of his employment include: whether the activity was during working hours; whether it was on the employer's premises; whether the employer derived substantial direct benefits from the activity; and whether the activity was contemplated by the employment contract. See, *Dorsch v. Industrial Commission*, 518 P.2d 954 (Colo. App. 1973). OSP points out that on December 2, 1995, Guerra worked from approximately 8 a.m. to 4 p.m. and it wasn't until 8 p.m. or 9 p.m. that he went to the Tequila Club. At the Tequila Club, he consumed numerous beers and danced for several hours. In addition, he left the work-site appropriately 10 hours prior to the accident. Therefore, OSP argues, Guerra was clearly outside the scope of his employment.

The Plaintiffs argue Guerra was clearly within his scope of employment because at the time of the accident Guerra was returning to his company provided apartment. In *Hynes v. Donaldson*, 395 P.2d 221 (Colo. 1964), the court held that while an employee is traveling at the employer's request, the employer is liable for acts done which are necessarily incidental to the employee's job. The court found the employer liable for an accident which occurred when the employee was returning to his hotel room after eating dinner. The Plaintiffs argue that as a traveling employee Guerra's visit to the Tequila Club was necessarily incidental to Guerra's employment.

The Plaintiffs also point to the special mission rule that arises when the employer calls the employee away from his regular place of work for purposes of the employer and to beneft the employer. In *Fitzpatrick v. United States*, 754 F. Supp. 1023 (D. Del. 1991), the court found that while an employee is on a special mission, the employer is liable for the normal risks inherent in the employee's travels. The Plaintiffs argue that the special mission rule applies to Guerra since he was in Denver temporarily at OSP's request. Therefore, Guerra was necessarily within the scope of his employment at the tune of the accident, since he was returning to the lodging provided for his use on his special mission.

The Plaintiffs cite several cases decided under workers compensation law to help determine if Guerra was within his scope of employment. See, *Gibson v. Dupree*, 114 P. 1133 (Colo. App. 1914); *Silver Engineering Works. Inc. v Simmons*, 505 P.2d 966 (Colo. 1973) and *Pat's Power Toros, Inc. v. Miller*, 474 P.2d 613 (Colo. 1970). The

Plaintiffs rely on these cases to argue that a traveling employer that is returning to company provided accommodations after personal mtmstrat:ons is always within his scope of employment.

The Court FINDS that Defendant Guerra was outside his scope of employment at the time of the accident. In *McOueen v. Robbins*, 476 P.2d 57 (Colo. App. 1970), the court was unwilling to stretch the concepts of "ministrations of self" and "incidental to, employment" to the point of holding that an employer is always liable for the acts of out-of-town employee which occur when the employee is going to or from a meal. In this instance, dancing and becoming intoxicated cannot be seen as necessarily incidental to Guerra's employment, therefsre, OSP is not liable for Guerra's acts under the theory of respondeat superior.

Dated this 30th day of March, 1998.

I

BY THE COURT

/s/
J. Stephen Phillips
District Court Judge

cc: Counsel of Record

Counsel to send caopy
to oposite party

COLORADO COURT OF APPEALS July 8, 1999
No. 98CA0911

Steven Pham, as personal representative of the estate of Louis Diep Pham, Kinh B. Pham and La T. Bui, natural parents of Louis Diep Pham, deceased; Khanh Ba Pham; Bang Le; Minh Ngoc Ha; Vu Duy Nguyen; and Kieu Trang Thi-Do,

Plaintiffs-Appellants,

v.

OSP Consultants, Inc.,

Defendant-Appellee.

Appeal from the District Court of the City and County of Denver
Honorable J. Stephen Phillips, judge
No. 96CV765

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE BRIGGS
Ruland and Kapelke, JJ., concur

The Law Firm of William W. Muhr, William W. Muhr, David A. Harper, Colorado Springs, Colorado, for Plaintiffs-Appellants

Lasater & Associates, P.C., J. Scott Lasater, Edward M. Allen, Littleton, Colorado, for Defendant-Appellee

Plaintiffs, Khanh Be Pham, Bang Le, Minh Ngoc Ha, Vu Duy Nguyen, Kieu Trang Phi-Do, Steven Pham, as personal representative of the estate of Louis Diep Pham, and Kinh B. Pham and La T. Bui, as natural parents of Louis Diep Pham, deceased, appeal the summary judgment entered in favor of defendant, OSP Consultants, Inc. (OSP). Plaintiffs assert the trial court erred in concluding that OSP was not liable under the doctrine of *respondeat superior* for damages caused by the negligence of an OSP employee (the employee) in an automobile accident. We affirm.

OSP temporarily assigned several emoloyees, who lived in another state, to work as a crew laying cable in Golorado. On the night of the accident, the employee drove to a bar with other crew members. While returning to their lodging several hours later, the employee drove his vehicle through a traffic signal and collided with plaintiffs' car. The occupants of plaintiffs' car were all injured, and one died from his injuries a few months later. At the time of the accident, the employee was legally intoxicated.

Plaintiffs sued the employee and OSP, claiming the employee was negligent and OSP was liable for that negligence under the doctrine of *respondeat superior*. Plaintiffs and OSP filed cross-motions for summary judgment on *respondeat superior* liability and submitted a statement of stipulated facts.

The trial curt bifurcated trial on the issues of liability and damages. On the day trial was scheduled to commence on liability, the employee admitted fault. Plaintiffs and OSP then agreed to vacate the trial and have the court rule on the crossmotions for summary judgment, based on the evidence in the stipulated facts and attachments to various pleadings. After the court granted summary judgment in favor of OSP, plaintiffs and the employee agreed that judgment could be entered against the employee for a stipulated amount of damages.

I.

Plaintiffs contend the trial court erred when it determined that, as a matter of law, the employee was outside the scope of employment when he caused the accident. We are not persuaded.

An employer is liable for the damages an employee negligently causes while within the scope of employment. That scope is determined by the purposeof the employee's act, rather than the method of performance. Thus, if the negligent act or omission was in the service of the employer's business, the employer is liable, even though the employer did not authorize the manner of performance. *Hynes v. Donaldson*, 155 Col. 456, 395 P.2d 221-(1904); *Gibson v. Dunree*, 26 Colo. App. 324, 144 P. 1133 (1914).

Acts within the scope of employment include those that are necessarily incidental to the employment. For example, if an employee is required to eat and sleep

away from home in order to carry on the employer's business, then the employee is within the scope of employment while doing so. The employee is likewise within the scope of employment while traveling to and rom such necessary lodging and meals. *Hynes v. Donaldson, supra.*

However, not every action an employee takes while on an assignment out of town necessarily falls within the scope of employment. The central inquiry remains whether the employee is engaged in an activity that bears some relationship to the employer's business. *Jones v. Donaldson, supra; McQueen v. Robbins,* 28 Colo. App). 430, 470 P.2d 57 (1970); *see also Ellerman v. Kite,* 625 P.2d 1006 (Colo. 1981); *cf.* Larson's, *Workers' Compensation Law* §14.00 (1998).

Here, the facts relied on by the parties,in addition to those already stated, were that OSP provided its employees lodging in apartments. It also provided several company trucks, and the employee drove one of the trucks to and from work. However, OSP did not permit him to use the truck for personal errands, meals, entertainment, or any other purposes not directly related to his work.

While assigned to work in Denver, the employee visited his home out of state and returned with his personal vehicle. He drove the vehicle for personal errands and sometimes gave rides to other workers. OSP did not object to the employee driving his personal vehicle for such purposes, but it did not reimburse any of

his expenses. A restaurant and grocery store were within walking distance of the lodging provided.

OSP provided the employee, in addition to free lodging, a per diem allowance in cash each Friday. The employee would occasionally drive other crew members in his own vehicle on weekends to socialize at local "bars, and OSP supervisors would occasionally participate. OSP did not object to such social gatherings or the consumption of alcohol on weekends when work was not required the following day, but it did not require or encourage these activities as a matter of company policy.

During the day preceding the accident, the employee had stopped working around 3:00 p.m. Between 8:00 and 10:00 p.m., he and the other two crew members drove to the bar. At the bar, they "danced and drank beer" until approximately 1:30 a.m. When they left the bar, they bought some tacos from a food truck in the bar's parking lot, ate them, and began the drive back to their lodging. The accident occurred on the trip between the bar and the apartment house.

In these circumstances, neither the purpose of the employee's trip nor the activities during the trip were in the service of OSP, and none of the activities was necessarily incidental to the employment. Thus, at the time of the accident the employee was not within the scope of his employment.

Plaintiffs seek to have us reach a different conclusion because the employee and other crew members had eaten some food and were returning to

their lodging when the accident occurred. Hence, according to plaintiffs' argument, at the time of the accident the employee had resumed activities for which OSP can be held liable.

We recognize that when an employee merely deviates from a mission for an employer but has then resumed the mission when the employee's negligence occurs, the employer Pay be liable for the tort committed under the doctrine of *respondeat superior. See Gibson v. Duoree, supra.* We may further assume, without deciding, that the employer may likewise be liable when the employee has deviated from, and then resumed, activities necessarily incidental to employment away from home, such as eating and sleeping. *See generally Fitzpatrick v. United States,* 754 F. Supp. 1023 (D. Del. 1991); *Short v. United States,* 245 F. Supp. 591 (D. Del. 1965). Nevertheless, the doctrine is not applicable in the circumstances presented here.

The employee's trip had begun between 8:00 and 10:00 p.m., several hours after work had ceased. The purpose of the trip from the start was personal entertainment. The "meal" the employee and the other crew members consumed before starting back to their lodging was itself incidental to the trip to the bar and the late hour at which they left the bar—not to the necessities of employment away from home. *See Liberty Mutual Insurance Co. v. Electronic Systems, Inc.,* 813 F. Supp. 802, 810 (S.D. Fla. 19993) (while activities related to the necessities of travel, such as eating in restaurants or sleeping in hotels, may remain within the scope of employment under tort law, "those related to mere

amusements.do not"); *see also Alexander Film Co. v. Industrial Commission*, 136 Colo. 486, 319 P.2d 1074, 1075 (1957) (activities such as eating meals are necessarily incidental to employment away from home because they are necessary to the continuance of the work and are therefore within the scope of employment, so long as they are performed "in a normal and prudent manner"); *McQueen v. Robbins, supra* (result in the ynes case was based on the rationale that the acts of the employee involved there bore some relationship to the business of the employer).

We are likewise not persuaded to reach a contrary result by plaintiffs' reliance on cases deciding whether, for purposes of workers' compensation coverage, a worker's injuries "arose out of and in the course of employment." *See PDM Molding, Inc. v. Stanberg*, 898 P.2d 592, 546 (Colo. 1995). We recognize that workers' compensation cases have on occasion been relied upon in determining the scope of employment for other purposes. *See Capra v. Tucker*, 857 P.2d 1346 (Colo. App. 1993) (applying workers' compensation law to determine whether public employee's negligence occurred within scope of employment for purposes of the Governmental Immunity Act).

However, even for purposes of workers' compensation, the supreme court has observed that not every act by an employee working away from home is ccmpensable:

> He might rob a bank; *he might attend a dance;* or he might engage in other activities

> or he might engage in other activities for his own pleasure and gratification, and ordinarily none of these acts would be beneficial or incidental to his employment and would constitute a stepping aside from the employment.

Alexander Film Co. v. Industrial Commission, supra, 136 Colo. at 492, 319 P.2d at 1078 (emphasis added).

Furthermore, despite some similarities in analysis, the scope of employment fo purposes of workers' compensation and *respondeat superior* liability is not always the same:

> [W]hile perhaps ninety percent of the decisions on the course of employment in routine cases are interchangeable between the two fields [of workers' compensation and *respondeat superior* liability], the analogy breaks down in certain close cases because of a fundamental difference between the two types of liability. In the law of *respondeat superior*, the harmful force is always an act of the servant, or at least the omission which is the equivalent of an act. The inquiry is whether performance of the act was in furtherance of the master's business. But in many workers' compensation situations, the harmful force is not the employee's act, but something acting upon the employee.

1 Larson, *supra*, §14.00 at 4-1 (emphasis in original).

Put another way, the scope of employment may be treated differently because the policy considerations for imposing liability on employers, as a matter f social duty, differ. As a result, "there may be situations where it may be proper to hold an employer liable for compensation benefits to the employee and yet not hold the employer responsible for that employee's conduct in causing injury to a third person arising out of the same situation." *See Liberty Mutual Insurance Co. v. Electronic Systems, Inc., supra*, 813 F. Supp. at.806.

In sum, we conclude that, at least for purposes of determining *respondeat superior* liability the employee was not within the scope of his employment at the time of the accident.

We therefore find no error in the trial court's grantsummary judgment in favor of OSP.

Judgment affirmed.

JUDGE RULAND and JUDGE KAPELKE concur.

38.2-2204. Liability insurance on motor vehicles, aircraft and watercraft; standard provisions; "omnibus clause"

A. No policy or contract of bodily injury or property damage liability insurance, covering liability arising from the ownership, maintenance, or use of any motor vehicle, aircraft, or private pleasure watercraft, shall be issued or delivered in this Commonwealth to the owner of such vehicle, aircraft or watercraft, or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle, aircraft, or private pleasure watercraft that is principally garaged, docked, or used in this Commonwealth, unless the policy contains a provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle, aircraft, or private pleasure watercraft with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle, aircraft, or watercraft by the named insured or by any such person; however, nothing contained in this section shall be deemed to prohibit an insurer from limiting its liability under any one policy for bodily injury or property damage resulting from any one accident or occurrence to the liability limits for such coverage set forth in the policy for any such accident or occurrence or for any one person, regardless of the number of insureds under that policy. Provided that, when one accident or occurrence involves more than one defendant who is covered by the policy, the plaintiff may recover the per person limit of the policy against each such defendant, subject to the per accident or occurrence limit of the policy. Each such policy or contract of liability

insurance, or endorsement to the policy or contract, insuring private passenger automobiles, aircraft, or private pleasure watercraft principally garaged, docked, or used in this Commonwealth, that has as the named insured an individual or husband and wife and that includes, with respect to any liability insurance provided by the policy, contract or endorsement for use of a nonowned automobile, aircraft or private pleasure watercraft, any provision requiring permission or consent of the owner of such automobile, aircraft, or private pleasure watercraft for the insurance to apply, shall be construed to include permission or consent of the custodian in the provision requiring permission or consent of the owner.

Virginia
Business Auto Coverage Part

Issued to form a part of Policy No. 42 UEN HD9012E to be effective 11-01-95 at the hour stated in the policy. The Stock Insurance Company providing this insurance is shown on the Declarations Page of such policy as the "insurer."

This Coverage Part is not binding unless countersigned by a duly authorized agent of ours; but if it takes effect as of the effective date of the policy of which the Coverage Part forms a part then countersignature on the Declarations Page of that policy by a duly authorized agent of ours is valid countersignature of this Coverage Part.

All of the provisions, conditions and other terms of this BUSINESS AUTO COVERAGE PART shall apply only as specified herein and none of the provisions, conditions and other terms of the policy of which this BUSINESS AUTO COVERAGE PART forms a part shall apply to insurance hereunder unless otherwise stated herein. Hereafter, any use of the word "policy" in this BUSINESS AUTO COVERAGE PART (or any endorsement forming a part of, changing or applicable to this BUSINESS AUTO COVERAGE PART) shall be deemed to read "BUSINESS AUTO COVERAGE PART."

DECLARATIONS—BUSINESS AUTO COVERAGE PART

ITEM ONE—NAMED INSURED AND ADDRESS

This BUSINESS AUTO COVERAGE PART is completed by:

(a) this Declarations Form C-2088,
Form C-2089,
Form C-2090,
Form C-2091,

(b) its provisions and conditions printed in Form CA00010180

(c) any Endorsements issued to form a part of it.

Form Numbers of Endorsement forming part of this BUSINESS AUTO COVERAGE PART on the above effective date:

CC-2246(03-93), PA-9945(07-92), CA-2133(09-94), CC-2121(07-91), C-3006-0), C-3023-0, C-3093-0, C-3101-2, CA-9923(12-80), CC-0116(03-93), CC-0169(06-89), CC-0268(07-91),
CC-2039(03-93), CC-9958(07-92), IH-1200(11-85)

Countersigned by _____
Authorized Agent

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BUSINESS AUTO POLICY (Ed. 01 80)

In return for the payment of the premium and subject to all the terms of this policy, we agree with you as follows:

PART I—WORDS AND PHRASES WITH SPECIAL MEANING—READ THEM CAREFULLY

The following words and phrases have special meaning throughout this policy and appear in boldface type when used:

A. "You" and "your" mean the person or organization shown as the named insured in ITEM ONE of the declarations.

B. "We", "us" and "our" mean the company providing the insurance.

C. "Accident" includes continuous or repeated exposure to the same conditions resulting in bodily injury or property damage the insured neither expected nor intended.

D. "Auto" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads but does not include mobile equipment.

E. "Bodily injury" means bodily injury, sickness or disease including death resulting from any of these.

F. "Insured" means any person or organization qualifying as an insured in the WHO IS INSURED section of the applicable insurance. Except with respect to our limit of liability, the insurance afforded applies separately to each insured who is seeking coverage or against whom a claim is made or suit is brought.

G. "Loss" means direct and accidental damage or loss.

H. "Mobile equipment" means any of the following type of land vehicles:

1. Specialized equipment such as: Bulldozers; Power shovels; Rollers, graders or scrapers; Farm machinery; Cranes; Street sweepers or other cleaners; Diggers; Forklifts; Pumps; Generators; Air Compressors; Drills; Other similar equipment.

2. Vehicles designed for use principally off public roads.

3. Vehicles maintained solely to provide mobility for such specialized equipment when permanently attached.

4. Vehicles not required to be licensed.

5. Autos maintained for use solely on your premises or that part of roads or other accesses that adjoin your premises.

I. "Property damage" means damage to or loss of use of tangible property.

J. "Trailer" includes semitrailer.

PART II—WHICH AUTOS ARE COVERED AUTOS

A. ITEM TWO of the declarations shows the autos that are covered autos for each year of your coverages. The numerical symbols explained in ITEM THREE of the declarations describe which autos are covered autos. The symbols entered next to a coverage designate the only autos that are covered autos.

B. OWNED AUTOS YOU ACQUIRE AFTER THE POLICY BEGINS.

1. If symbols "1", "2", "3", "4", "5" or "6" are entered next to a coverage in ITEM TWO, then you already have coverage for autos of the type described until the policy ends.

2. But, if symbol "7" is entered next to a coverage in ITEM TWO, an auto you acquire will be a covered auto for that coverage only if:

a. We already insure all autos that you own for that coverage or it replaces

an auto you previously owned that had that coverage; and

b. You tell us within 30 days after you acquire it that you want us to insure it for that coverage.

C. CERTAIN TRAILERS AND MOBILE EQUIPMENT.

If the policy provides liability insurance, the following types of vehicles are covered autos for liability insurance:

1. Trailers with a load capacity of 2,000 pounds or less designed primarily for travel on public roads.

2. Mobile equipment while being carried or towed by a covered auto.

PART III—WHERE AND WHEN THIS POLICY COVERS

We cover accidents or losses which occur during the policy period:

A. In the United States of America, its territories or possessions, Puerto Rico or Canada; or

B. While the covered auto is being transported between any of these places.

PART IV —LIABILITY INSURANCE

A. WE WILL PAY.

1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto.

2. We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage not covered by this policy. We may investigate and settle any claim or suit as we consider appropriate. Our payment of the LIABILITY INSURANCE limit ends our duty to defend or settle.

B. WE WILL ALSO PAY.

In addition to our limit of liability, we will pay for the insured:

1. Up to $250 for cost of bail bonds (including bonds for related traffic law violations)

required because of an accident we cover. We do not have to furnish these bonds.

2. Premiums on appeal bonds in any suit we defend.

3. Premiums on bonds to release attachments in a suit we defend but only for bonds up to our limit of liability.

4. All costs taxed to the insured in a suit we defend.

5. All interest accruing after the entry of the judgment in a suit we defend. Our duty to pay interest ends when we pay or tender our limit of liability.

6. Up to $50 a day for loss of earnings (but not other income) because of attendance at hearings or trials at our request.

7. Other reasonable expenses incurred at our request.

C. WE WILL NOT COVER—EXCLUSIONS.

This insurance does not apply to:

1. Liability assumed under any contract or agreement.

2. Any obligation for which the insured or his or her insurer may be held liable under any workers' compensation or disability benefits law or under any similar law.

3. Any obligation of the insured to indemnify another for damages resulting from bodily injury to the insured's employee.

4. Bodily injury to any fellow employee of the insured arising out of and in the course of his or her employment.

5. Bodily injury to any employee of the insured arising out of and in the course of his or her employment by the insured. However, this exclusion does not apply to bodily injury to domestic employees not entitled to workers' compensation benefits.

6. Property damage to property owned or transported by the insured or in the insured's care, custody or control.

7. Bodily injury or property damage resulting from the handling of property:

   a. Before it is moved from the place where it is accepted by the insured for movement into or onto the covered auto, or

b. After it is moved from the covered auto to the place where it is finally delivered by the insured.

8. Bodily injury or property damage resulting from the movement of property by a mechanical device (other than a hand truck) not attached to the covered auto.

9. Bodily injury or property damage caused by the dumping, discharge or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental.

D. WHO IS INSURED.

1. You are an insured for any covered auto.

2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow except:

a. The owner of a covered auto you hire or borrow from one of your employees or a member of his or her household.

b. Someone using a covered auto while he or she is working in a business of selling, servicing, repairing or parking autos unless that business is yours.

c. Anyone other than your employees, a lessee or borrower or any of their employees, while moving property to or from a covered auto.

3. Anyone liable for the conduct of an insured described above is an insured but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own.

E. OUR LIMIT OF LIABILITY.

1. Regardless of the number of covered autos, insureds, claims made or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the LIABILITY INSURANCE limit shown in the declarations.

2. All bodily injury and property damage resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one accident.

F. OUT OF STATE EXTENSIONS OF COVERAGE.

1. While a covered auto is away from the state where it is licensed we will:

a. Increase this policy's liability limits to meet those specified by a compulsory or financial responsibility law in the jurisdiction where the covered auto is being used.

b. Provide the minimum amounts and types of other coverages, such as "No-Fault", required of out of state vehicles by the jurisdiction where the covered auto is being used.

2. We will not pay anyone more than once for the same elements of loss because of these extensions.

PART V—PHYSICAL DAMAGE INSURANCE

A. WE WILL PAY.

1. We will pay for loss to a covered auto or its equipment under:

a. Comprehensive Coverage. From any cause except the covered auto's collision with another object or its overturn.

b. Specified Perils Coverage. Caused by:

(1) Fire or explosion;

(2) Theft;

(3) Windstorm, hail or earthquake;

(4) Flood;

(5) Mischief or vandalism;

(6) The sinking, burning, collision or derailment of any conveyance transporting the covered auto.

c. Collision Coverage. Caused by the covered auto's collision with another object or its overturn.

2. Towing.

We will pay up to $25 for towing and labor costs incurred each time a covered auto of the private passenger type is disabled. However, the labor must be performed at the place of disablement.

B. WE WILL ALSO PAY.

We will also pay up to $10 per day to a maxiumum of $300 for transportation expense incurred by you because of the total theft of a

covered auto of the private passenger type. We will pay only for those covered autos for which you carry either Comprehensive or Specified Perils Coverage. We will pay for transportation expenses incurred during the period beginning 48 hours after the theft and ending, regardless of the policy's expiration, when the covered auto is returned to use or we pay for its loss.

C. WE WILL NOT COVER—EXCLUSIONS.

This insurance does not apply to:

1. Wear and tear, freezing, mechanical or electrical breakdown unless caused by other loss covered by this policy.

2. Blowouts, punctures or other road damage to tires unless caused by other loss covered by this policy.

3. Loss caused by declared or undelcared war or insurrection or any of their consequences.

4. Loss caused by the explosion of a nuclear weapon or its consequences.

5. Loss caused by radioactive contamination.

6. Loss to tape decks or other sound reproducing equipment not permanently installed in a covered auto.

7. Loss to tapes, records or other sound reproducing devices designed for use with sound reproducing equipment.

8. Loss to any sound receiving equipment designed for use as a citizens' band radio, two-way mobile radio or telephone or scanning monitor receiver, including its antennas and other accessories, unless permanently installed in the dash or console opening normally used by the auto manufacturer for the installation of a radio.

D. HOW WE WILL PAY FOR LOSSES—THE MOST WE WILL PAY.

1. At our option we may:

   a. Pay for , repair or replace damaged or stolen property; or

   b. Return the stolen property, at our expense. We will pay for any damage that results to the auto from the theft.

2. The most we will pay for loss is the smaller of the following amounts:

   a. The actual cash value of the damaged or stolen property at the time of loss.

b. The cost of repairing or replacing the damaged or stolen property with other of like kind or quality.

3. For each covered auto, our obligation to pay for, repair, return or replace damaged or stolen property will be reduced by the applicable deductible shown in the declarations. Any Comprehensive Coverage deductible shown in the declarations does not apply to loss caused by fire or lightning.

E. GLASS BREAKAGE—HITTING A BIRD OR ANIMAL—FALLING OBJECTS OR MISSILES.

We will pay for glass breakage, loss caused by hitting a bird or animal or by falling objects or missiles under Comprehensive Coverage if you carry Comprehensive Coverage for the damaged covered auto. However, you have the option of having glass breakage caused by a covered auto's collision or overturn considered a loss under Collision Coverage.

PART VI—CONDITIONS

The insurance provided by this policy is subject to the following conditions:

A. YOUR DUTIES AFTER ACCIDENT OR LOSS.

1. You must promptly notify us or our agent of any accident or loss. You must tell us how, when and where the accident or loss happened. You must assist in obtaining the names and addresses of any injured persons and witnesses.

2. Additionally, you and other involved insureds must:

   a. Cooperate with us in the investigation, settlement or defense of any claim or suit. No insured shall, except at his or her own cost, voluntarily make any payment, assume any obligation or incur any expense.

   b. Immediately send us copies of any notices or legal papers resceived in connection with the accident or loss.

   c. Submit at our expense and as often as we require to physical examinations by physicians we select.

   d. Authorize us to obtain medical reports and other pertinent medical information.

3. Additionally, to recover for loss to a covered auto or its equipment you must do the following:

   a. Permit us to inspect and appraise the damaged property before its repair or disposition.

   b. Do what is reasonably necessary after loss at our expense to protect the covered auto from further loss.

   c. Submit a proof of loss when required by us.

   d. Promptly notify the police if the covered auto or any of its equipment is stolen.

B. OTHER INSURANCE.

1. For any covered auto you own this policy provides primary insurance. For any covered auto you don't own, the insurance provided by this policy is excess over any other collectible insurance. However, while a covered auto which is a trailer is connected to another vehicle the liability coverage this policy provides for the trailer:

   a. Is excess while it is connected to a motor vehicle you don't own.

b. Is primary while it is connected to a covered auto you own.

2. When two or more policies cover on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the limit of our policy bears to the total of the limits of all the policies covering on the same basis.

C. OUR RIGHT TO RECOVER FROM OTHERS.

If we make any payment, we are entitled to recover what we paid from other parties. Any person to or for whom we make payment must transfer to us his or her rights of recovery against any other party. This person must do everything necessary to secure these rights and must do nothing that would jeopardize them.

D. CANCELLING THIS POLICY DURING THE POLICY PERIOD.

1. You may cancel the policy by returning it to us or by giving us advance notice of the date cancellation is to take effect.

2. We may cancel the policy by mailing you at least 10 days notice at your last address known by us. We may deliver any notice instead of mailing it. Proof of mailing of any notice will be sufficient proof of notice.

3. The effective date of cancellation stated in the notice shall become the end of the policy period.

4. If this policy is cancelled, you may be entitled to a premium refund. If so, we will send you the refund. However, making or offering to make the refund is not a condition of cancellation. If you cancel, the refund, if any, will be computed in accordance with the customary short rate procedure. If we cancel, the refund, if any, will be computed pro rata.

E. LEGAL ACTION AGAINST US.

No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under LIABILITY INSURANCE, no legal action may be brought against us until we agree in writing that the insured has an obligation to pay or until the amount of that obligation has been finally determined by judgment after trial. No person or organization has any right under this policy to bring us into any action to determine the liability of the insured.

F. INSPECTION.

At our option we may inspect your property and operations at any time. These inspections are for our benefit only. By our right to inspect or by our

making any inspection we make no representation that your property or operations are safe, not harmful to health or comply with any law, rule or regulation.

G. CHANGES.

This policy contains all the agreements between you and us. Its terms may not be changed or waived except by endorsement issued by us. If a change requires a premium adjustment, we will adjust the premium as of the effective date of change. If we revise this policy form to provide more coverage without additional premium charge your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

H. TRANSFER OF YOUR INTEREST IN THIS POLICY.

Your rights and duties under this policy may not be assigned without our written consent.

I. NO BENEFIT TO BAILEE—PHYSICAL DAMAGE INSURANCE ONLY.

We will not recognize any assignment or grant any coverage for the benefit of any person or organization holding, storing or transporting property for a fee regardless of any other provision of this policy.

J. BANKRUPTCY.

Bankruptcy or insolvency of the insured shall not relieve us of any obligations under this policy.

K. APPRAISAL FOR PHYSICAL DAMAGE LOSSES.

1. If you and we fail to agree as to the amount of loss either may demand an appraisal of the loss. In such event, you and we shall each select a competent appraiser, and the appraisers shall select a competent and distinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss, and, failing to agree, shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. You and we shall each pay the chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

2. We shall not be held to have waived any of our rights by any act relating to appraisal.

L. TWO OR MORE POLICIES ISSUED BY US.

If this policy and any other policy issued to you by us or any company affiliated with us apply to the same accident, the aggregate maximum limit of liability under all the policies shall not exceed the highest applicable limit of liability under any one policy. This condition does not apply to any

policy issued by us or an affiliated company specifically to apply as excess insurance over this policy.

DECLARATIONS—
BUSINESS AUTO POLICY (Continued)
ITEM TWO—SCHEDULE OF COVERAGES AND COVERED AUTOS
Policy No. 42 UEN HD9012E

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those autos shown as covered autos. Autos are shown as covered autos for a particular coverage by the entry of one or more of the symbols from ITEM THREE next to the name of the coverage.

COVERAGES	COVERED AUTOS (Entry of one or more of the symbols from ITEM THREE shows which autos are covered autos	LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS (Absence of a limit entry means that the limit entry shown, if any, in ITEM FOUR applies instead)	ESTIMATED PREMIUM
AA=LIABILITY INSURANCE	01	$1,000,000 each accident	$104,000
MEDICAL EXPENSE AND INCOME LOSS BENEFITS	05	Separately Stated in Each Medical Expense and Income Loss Benefits Endorsement Medical Expense Benefits $ 10,000 each person Income Loss Benefits $ 5,200 each person	Incl
AG=UNINSURED MOTORISTS INSURANCE	06	$1,000.00 each accident	$ Incl

PHYSICAL DAMAGE INSURANCE AJ=COMPREHENSIVE COVERAGE	02	Actual Cash Value, Cost of Repair or the Stated Amount shown in ITEM FOUR as "Dollar Limit", whichever is smallest, minus any Deductible shown in ITEM FOUR for each covered auto for all loss except fire or lightning.	$23,600
AK=SPECIFIED PERILS COVERAGE		Actual Cash Value, Cost of Repair, or the Stated Amount shown in ITEM FOUR as "Dollar Limit", whichever is smallest, minus $25 Deductible for each covered auto for loss covered by mischief or vandalism	$
AR=COLLISION COVERAGE	02	Actual Cash Value, Cost of Repair, or the Stated Amount shown in ITEM FOUR as "Dollar Limit", whichever is smallest, minus any DEductible shown in ITEM FOUR for each covered auto	$ Incl
AT=TOWING AND LABOR (not available in California)	03	$50 for each disablement of a private passenger auto	$ Incl

	Endorsement Premium (Not included in above Coverage premiums)	$

	ESTIMATED TOTAL PREMIUM	$127,600

The estimated total premium for this policy is based on the exposures you told us you would have when this policy began.
We will compute your final premium due when we determine your actual exposures. The extimated total premium will be credited against the final premium due and you will be billed for the balance, if any. If the estimated total premium exceeds the final premium due you will get a refund. To determine your final premium due we may examine your records at any item duing the period of coverage and up to three years afterward. If this policy is issued for more than one year, the premium shall be computed annually based on our rates or premiums in effect at the beginning of each year of the policy.

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VIRGINIA
DECLARATIONS—
BUSINESS AUTO POLICY (Continued)

ITEM THREE—DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS

SYMBOL	DESCRIPTION
1 =	ANY AUTO.
2 =	OWNED AUTOS ONLY. Only those autos you own (and for liability coverage any trailers you don't own while attached to power units you own). This includes those autos whose ownership you acquire after the policy begins.
3 =	OWNED PRIVATE PASSENGER AUTOS ONLY. Only the private passenger autos you own. This includes those private passenger autos whose ownership you acquire after the policy begins.
4 =	OWNED AUTOS OTHER THAN PRIVATE PASSENGER AUTOS ONLY. Only those autos you own which are not of the private passenger type (and for liability coverage any trailers you don't own while attached to power units you own). This includes those autos, not of the private passenger type, whose ownership you acquire after the policy begins.
5 =	OWNED AUTOS SUBJECT TO NO-FAULT. Only those autos you own for which you are required

to have No-Fault Benefits in the state where they are licensed or principally garaged. This includes those autos whose ownership you acquire after the policy begins provided you are required to have No-Fault Benefits in the state where they are licensed or principally garaged.

6 = OWNED AUTOS SUBJECT TO A COMPULSORY UNINSURED MOTORISTS LAW. Only those autos you own for which, because of the law in the state where they are licensed or principally garaged you are required to have and cannot reject uninsured motorists insurance. This includes those autos whose ownership you acquire after the policy begins provided they are subject to the same state uninsured motorists requirement.

7 = SPECIFICALLY DESCRIBED AUTOS. Only those autos described in ITEM FOUR for which a premium charge is shown (and for liability coverage any trailers you don't own while attached to any power unit described in ITEM FOUR).

8 = HIRED AUTOS ONLY. Only those autos you lease, hire, rent or borrow. This does not include any auto you lease, hire, rent or borrow from any of your employees or members of their households.

9 = NONOWNED AUTOS ONLY. Only those autos you do not own, lease, hire or borrow which are

used in connection with your business. This includes autos owned by your employees or members of their households but only while used in your business or your personal affairs.

10 = _____

_____

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COMMERCIAL AUTOMOBILE BROAD FORM ENDORSEMENT

THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED UNDER THE FOLLOWING:

BUSINESS AUTO POLICY

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Endorsement Effective	Policy No.
Named Insured	Countersigned by

(Authorized Representative)

_____ endorsement premium subject to a minimum premium of $ _____. Any minimum premium is applicable to the term of the policy and applies in addition to any other applicable minimum premium(s).

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

To the extent that the provisions of this endorsement provide broader benefits to the insured than other provisions of the policy, the provisions of this endorsement control.

1. EXTENDED CANCELLATION CONDITION

Under PART VI—CONDITIONS, Paragraph D.2. applies except as follows:

If we cancel for any reason other than nonpayment of premium, we will mail or deliver to the Named Insured written notice of cancellation at least 60 days before the effective date of cancellation.

2. BROAD FORM INSURED

A. The Named Insured shown in the Declarations is amended to include:

(1) Any legally Incorporated subsidiary in which you own more than 50% of the voting stock on the effective date of the Policy. However, the Named Insured does not include any subsidiary that is an "Insured" under any other automobile liability policy or would be an "Insured" under such a policy but for its termination or the exhaustion of its Limit of Liability.

(2) Any organization that is acquired or formed by you and over which you

maintain majority ownership. However, the Named Insured does not include any newly formed or acquired organization:

(a) That is a joint venture or partnership;

(b) That is an "insured" under any other policy;

(c) That has exhausted its Limit of Liability under any other policy; or

(d) 180 days or more after its acquisition or formation by you, unless you have given us notice of the acquisition or formation.

Coverage does not apply to "bodily injury" or "property damage" that results from an accident that occurred before you formed or acquired the organization.

B. Paragraph D—WHO IS INSURED of PART IV—LIABILITY INSURANCE is amended to add:

4. Any employee of yours while using a "covered auto" you don't own, hire or borrow in your business or your personal affairs.

3. LIABILITY COVERAGE EXTENSIONS—WE WILL ALSO PAY

Paragraph B—WE WILL ALSO PAY, under PART IV—LIABILITY INSURANCE, is amended as follows:

> The reference to $250 for the cost of bail bonds is replaced by $1000 and the reference to $50 per day for loss of earnings is replaced by $250 per day.

4. AMENDED FELLOW EMPLOYEE EXCLUSION

Under PART IV—LIABILITY INSURANCE, exclusion related to the Fellow Employee, does not apply the "bodily injury" results from the use of a covered "auto" you own or hire. Coverage is excess over any other collectible insurance.

5. HIRED AUTO PHYSICAL DAMAGE INSURANCE

If hired "autos" are covered "autos" for Liability Coverage and if Comprehensive, Specified Perils, or Collision coverages are provided under this Policy for any "auto" you own, then the Physical Damage Coverages provided are extended to "autos" you hire subject to the following limit.

The most we will pay for loss to any hired "auto" is $35,000 or Actual Cash Value or Cost of Repair, whichever is smallest, minus a deductible. The

deductible will be equal to the largest deductible applicable to any owned "auto" for that coverage. No deductible applies to "loss" caused by fire or lightning. Hired Auto Physical Damage coverage is excess over any other collectible insurance. Subject to the above limit, deductible and excess provisions, we will provide coverage equal to the broadest coverage applicable to any covered "auto" you own.

We will also cover loss of use of the hired "auto" if it results from an accident you are legally liable and the lessor incurs an actual financial loss, subject to a maximum of $500 per accident.

6. PHYSICAL DAMAGE INSURANCE—WE WILL ALSO PAY

Paragraph B of PART V—PHYSICAL DAMAGE INSURANCE is amended to provide a limit of $50 per day and a maxiumum limit of $1000.

7. AMENDMENT TO YOUR DUTIES AFTER ACCIDENT OR LOSS

The requirement in PART VI—CONDITIONS, A.—YOUR DUTIES AFTER ACCIDENT OR LOSS—that you must notify us of an "accident" applies only when the "accident" is known to:

(1) You, if you are an individual;

(2) A partner, if you are a partnership; or

(3) An executive officer or insurance manager, if you are corporation.

8. HIRED AUTO—COVERAGE TERRITORY

PART III—WHERE AND WHEN THIS POLICY COVERS—is amended to include:

C. For short-term hired "autos", the coverage territory is anywhere in the world provided that if the Insured's responsibility to pay damages for "bodily injury" or "property damage" is determined in a "suit", the "suit" is brought in the territory described in Paragraph A.

9. RESULTANT MENTAL ANGUISH COVERAGE

The definition of "bodily injury" in PART I—WORDS AND PHRASES WITH SPECIAL MEANING is replaced by the following:

"Bodily injury" means bodily injury, sickness or disease sustained by any person, including mental anguish or death resulting from any of these.

10. LEASE GAP COVERAGE

Under PART V—PHYSICAL DAMAGE INSURANCE. If a long-term leased "auto" is a covered "auto" and the lessor is named as an Additional Insured-Lessor, we will pay in the event of a total loss your additional legal

obligation to the lessor for any difference between the actual cash value of the "auto" at the time of loss and the "outstanding balance" of the lease.

"Outstanding balance" means the amount you owe on the lease at the time of loss less any amounts representing taxes; overdue payments; penalties, interest or charges resulting from overdue payments; additional mileage charges; excess wear and tear charges; lease termination fees.

11. GLASS REPAIR—WAIVER OF DEDUCTIBLE

Under Paragraph D.—HOW WE WILL PAY FOR LOSSES—THE MOST WE WILL PAY—of PART V —PHYSICAL DAMAGE INSURANCE, the following is added:

No deductible applies to glass damage if the glass is repaired rather than replaced.

12. AIRBAG COVERAGE

Under Paragraph C.—WILL WILL NOT COVER—EXCLUSIONS—of PART V—PHYSICAL DAMAGE INSURANCE, the following is added:

The exclusion relating to mechanical breakdown does not apply to the accidental discharge of an airbag.

13. SOUND RECEIVING AND REPRODUCING EQUIPMENT—BROADENED COVERAGE

Under Paragraph C.—WE WILL NOT COVER—EXCLUSIONS—of PART V—PHYSICAL DAMAGE INSURANCE, the exclusion as it relates to sound receiving or reproducing equipment does not apply to sound receiving or reproducing equipment that is permanently installed in a covered "auto."

14. EXTRA EXPENSE—BROADENED COVERAGE

Under Paragraph D.—HOW WE WILL PAY FOR LOSSES—THE MOST WE WILL PAY—of PART V—PHYSICAL DAMAGE INSURANCE, we will pay for the expense of returing a stolen covered "auto" to you.

15. TWO OR MORE DEDUCTIBLES

Under Paragraph D.—HOW WE WILL PAY FOR LOSSES—THE MOST WE WILL PAY—of PART V—PHYSICAL DAMAGE INSURANCE, the following is added:

If another ITT Hartford Insurance Group company policy or coverage form that is not an automobile policy or coverage form applies to the same accident, the following applies:

1. If the deductible under this Business Auto Policy is the smaller (or smallest) deductible, it will be waived;

2. If the deductible under this Business Auto Policy is not the smaller (or smallest) deductible, it will be reduced by the amount of the smaller (or smallest) deductible.

ITT HARTFORD

POLICY NUMBER: 42 UEN HD9012 E

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SCHEDULE FOR COMPOSITE RATING BASIS—AUTOMOBILE LIABILITY COVERAGE

It is agreed that the premium for this insurance shall be determined by applying a composite rate per covered auto.

SCHEDULE

[*Material in brackets was handwritten.]

Coverage	Class Code	State	Premium Base Est. No. of Autos *[79→S1-7 renewal]	Composite Rate	Estimated Premium
Liability Insurance	All	All	~~57~~	*[1,787.00] ~~$1,824.56~~	*[$141,173] $104,000.
Medical Expense and Income Loss Benefits					Included
Uninsured Motorists Insurance					Included

CHANGE IN CONDITIONS

The following is added to the Premium Audit condition:

You shall maintain a record of all autos including purchase date and the date any autos deleted. You shall also maintain a record of all autos leased for six months or longer.

Premium will be determined by adding the number of Power Units at inception and at expiration and dividing by two, and multiplying times the Composite Rate.

This endorsement does not change the policy except as shown.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

STEVEN PRAM, as personal)
representative of the estate of)
LOUIS DIEP PRAM,)
17955 East Caspian Place,)
Aurora Colorado 80013)
)
KINH B. PRAM AND LA T. BUI,)
natural parents of LOUIS DIEP)
PHAM, deceased;)
2846 South Waco Way,)
Aurora, Colorado 80013)
)
KI-IANH BA PRAM;)
4778 South Liverpool Circle,)
Aurora, Colorado 80013)
)
BANG LE;)
7113 North Sheridan Street,)
Arvada, Colorado 80003)
)
MINH NGOC HA;)
18163 East Anherst Drive,)
Aurora, Colorado 80013)
)
VU DUY NGUYEN;)
10856 Crooke Drive,)
Parker, Colorado 80134)
)
KIEU TRANG THI-DO)
10856 Crooke Drive,)

Parker, Colorado 80134	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 03-
	)	1316-A
HARTFORD FIRE	)	
INSURANCE COMPANY	)	
c/o Registered Agent	)	
Commonwealth Legal Services	)	
Corporation	)	
4701 Cox Road, #301	)	
Glen Allen, VA 23060	)	
	)	
Defendant.	)	

AMENDED COMPLAINT

The Plaintiffs, by and through their counsel, William Muhr, Esq., hereby state the following Fire Insurance Company:

JURISDICTION AND VENUE

1. Plaintiffs STEVEN HAM, as personal representative of the estate of LOUIS DIEP PHAM, KINH B. PHAM AND LA T. BUI, natural parents of LOUIS DIEP PHAM, deceased; KHANH BA PHAM; BANG LE; MINH NGOC HA; VU DUY NGUYEN; KIEU TRANG THI-DO all reside and are domiciled in Colorado.

2. Defendant HARTFORD FIRE INSURANCE COMPANY is a Connecticut corporation with its principal place of business in State of Connecticut with

offices in the city of ALEXANDRIA and the State of Virginia. Hartford's principal place of business is Hartford Plaza, Hartford, Connecticut 06115. Hartford's claim office in Virginia is 5285 Shawnee Road, Alexandria, Virginia 22313.

3. The matter in controversy exceeds the $100,000,000 policy limits of the Hartford policy exclusive of interest and costs.

4. Jurisdiction of this Court also is predicated on the fact that the Hartford insurance policy was issued in Virginia both to OSP Consultants, Inc., a Virginia corporation, whose principal place of business address is 21400 Ridgetop Circle, Sterling, VA 20166; and to Guerra an employee of OSP and resident of Virginia at the time of the accident. OSP Consultants, Inc has its principal place of business in Loudon County, State of Virginia, and is the where the said Hartford liability insurance policy was issued.

5. Venue is proper in this case in that the execution on the judgment was attempted in Virginia where Guerra resides and is domiciled and where the said execution on the judgment was returned unsatisfied. Further, Defendant Hartford is subject to personal jurisdiction in Virginia where Hartford is licensed to do business where the policy was issued to OSP Consultants, Inc.; a Virginia corporation, and where Hartford maintains an agent for service of process. Further, the Hartford liability insurance policy was issued to both OSP Consultant's Inc and its employee Guerra at 21400 Ridgetop Circle, Sterling, VA, County of Loudon.

GENERAL ALLEGATIONS

6. The Plaintiffs restate and reallege paragraphs 1 through 5 as if set forth herein in full.

7. Defendant Hartford Fire Insurance Company (hereinafter "Hartford") provided insurance in the form of a Business Auto Policy (attached as **EXHIBIT "A"** and incorporated herein by reference) to OSP Consultants, Inc. (hereinafter "OSP"), and OSP's employees, including Erwin Ovidid Guerra (hereinafter "Guerra").

8. At the time of the accident, OSP, a Virginia based corporation, provided fiberoptic cable installation services to large cable companies throughout the United States. As part of its business, OSP sent work crews from its headquarters in Virginia to work on temporary assignments installing fiber-optic cable at different locations throughout the country. During the period of the temporary assignments, OSP provided its work crews with an apartment in which to live and a weekly per diem allowance.

9. In early 1995, while working in his regular permanent position with OSP in Virginia, Guerra accepted a temporary assignment laying fiber-optic cable for OSP in Denver. In addition to his regular pay, Guerra was paid a weekly *per diem* allowance and provided free housing in OSP-provided apartments located in Aurora, Colorado. These apartments were also used by OSP as a place to park OSP's vehicles overnight; and OSP maintained an office at the apartments where Plaintiff Guerra and his co-employees would have to meet to

obtain their work assignments and obtain transportation to the job sites in the Denver area.

10. While working in Denver, Guerra held the position of "lead laborer" and was responsible for driving OSP employees to and from the job site and the OSP-provided apartments. He was also responsible for getting his crew together for each work assignment, supervising his crew, and looking out for his crew's welfare. He also acted as liaison between the crew and the OSP supervisors.

11. Because most of the OSP crew members were foreign nationals separated from their families for extended periods of time while they were temporarily assigned in Denver, some workers would quit their job in Denver shortly after arriving and return to their homes in Virginia or to their native country. The loss of crew members would result in a delay of the OSP's Denver project.

12. Guerra attempted to overcome his crew members" feelings of homesickness, by encouraging social activities and fostering comradery and cooperation among them. Because OSP allowed its workers to drink alcohol on weekends, OSP employees would generally meet at local night spots on Friday and Saturday nights to eat, drink and socialize. OSP supervisors would also occasionally participate in these social gatherings. Further, OSP had a policy of giving their employees, working temporarily in Denver, a cash payment of approximately $105.00 every Friday evening prior to the start of the social activities. These social gatherings

fostered a positive relationship between the OSP supervisors and the crew members and among the crew members themselves thereby improving worker retention among the employees of OSP working on temporary assignments in Denver without their family and friends who remain and reside in their Virginia domiciliary.

13. Also, because most of the crew members were from Mexico and Central America, and could not speak English, they preferred to eat and socialize at the Mexican night clubs in Denver, where the waitresses spoke Spanish and Mexican style food was served. The "South of the Border" atmosphere of these clubs relieved the OSP workers' homesickness and contributed to a happy and content work crew. Because the OSP crews worked together all week, they would also talk at these social gatherings about the work they had done during the week and about the next weeks' work schedule.

14. OSP did not allow company-owned vehicles to be used by OSP employees once the daily work assignments for OSP were completed. As a result, OSP employees were required to use their own private vehicles, or hitch rides with employees who had vehicles, in order to travel to local restaurants, shops, night spots or other establishments to obtain meals, groceries, other necessities, or to socialize.

15. After working on OSP's Denver job for some time, Guerra, who maintained his permanent residence in Alexandria, Virginia, near OSP's corporate headquarters, returned, with the permission of OSP, to

his home in Virginia from Denver to obtain his own vehicle, a 1985 Volvo station wagon, which he drove from his home in Virginia back to the OSP job site in Denver. Although OSP did not allow other OSP employees to have there cars in Colorado while on temporary assignment for OSP, Guerra was one of about three OSP employees who was given permission to have his car in Colorado while on temporary assignment for OSP and OSP allowed him to use his vehicle to obtain meals, groceries, and other necessities for himself and other OSP employees, and to travel to social gatherings with other OSP employees and to give rides to those OSP employees who did not have their own vehicles, such as his co-worker and crew-member, Jose Cornejo.

16. At all times relevant herein, Hartford's Business Auto Policy provided liability insurance coverage in the amount of $1,000,000.00 per accident for **"any auto"** (see ITEM TWO - SCHEDULE OF COVERAGES AND COVERED AUTOS, and ITEM THREE - DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS, attached as **EXHIBITS "B" and "C"** respectively and incorporated herein by reference). The estimated yearly premium for this liability insurance coverage was $104,000.00. **(Exhibit C).** This Business Auto Policy was excess over any other collectible insurance coverage which the employees may have had on their own vehicles, such as the vehicle driven and ownedd by Guerra.

17. The Commercial Automobile Broad Form Endorsement (attached as **EXHIBIT "D"** and incorporated herein by reference) modifies the insurance

provided under the Business Auto Policy, and states as follows: **"THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.... To the extent that the provisions of this endorsement provide broader benefits to the insured than other provisions of the policy, the provisions of this endorsement control."**

18. Besides expanding who was a named insured under the policy and providing broader benefits regarding hired autos, the said Broad Form Endorsement at **Exhibit D** also provided additional coverage at section 2B thereof as follows:

"Paragraph D - WHO IS INSURED OF PART IV - LIABILITY INSURANCE amended to add:

> **"4. Any employee of yours *while using a covered "auto" you don't own. hire or borrow in your business or your personal affairs*." (Emphasisadded)**

19. Pursuant to Part IA of the Business Auto Policy, "you," "your " and "yours" refers to OSP.

20. The effect of the language contained in section 2B of said Broad Form Endorsement at **Exhibit D** was to **extend coverage to OSP employees while using a covered "auto" that OSP did not own hire or borrow in its business or personal affairs**; in other words, the clear language of the policy provided coverage to an employee (like Guerra) while driving his own vehicle while in temporary assignment in Denver. Another, more restrictive, interpretation of Hartford's policy is that Guerra was covered under the Hartford Broad Form

Endorsement **as long as Guerra was using his Auto in the business or personal affairs of OSP, however remote, at the time of the accident**. The insurance term "business or personal affairs" is extremely broad and not defined in the Hartford policy. "Business or personal affairs" is so broad as to mean "if it's not business, it's personal;" if it's not personal, it's business." That is, "business or personal affairs" of OSP means any "affairs" of OSP. Although the Hartford policy also does not define "affairs" of OSP, Black's Law Dictionary defines the term "affairs" very broadly as "anything a person may do" relating in any way to OSP. Further, the Hartford liability policy does not exclude coverage to Guerra (for the benefit of accident victims) if Guerra socializes and/or drinks with OSP supervisors while on temporary assignment in Denver.

21. OSP gave its express permission to Guerra to use his personal vehicle for OSP's Business and Personal affairs when it allowed him to bring his personal car to Denver, Colorado, while not allowing the vast majority of the other OSP employees to bring their personal cars from out of state to the temporary work site in Denver, Colorado. OSP gave Guerra express permission to bring his personal car from Virginia to Denver, Colorado, to use to drive himself and his crew to the grocery store, restaurants, bars, and other places. On or about December 3, 1995, after some drinking and socializing with other OSP employees at the Tequila Club, a Denver night spot, Guerra and co-employee crew-member, Jose Comejo, stopped to eat a meal, consisting of beef tacos and drinks. OSP paid weekly cash per diem that was used to purchase the meals. After Guerra and Comejo

finished their meals, Guerra then drove himself and Comejo (who did not have a vehicle) back to the OSP-provided apartments where they lived; received work schedules; began each work day; and where company-owned vehicles were parked each night. Guerra drove Cornejo back to the company-provided apartments because they were required to go there by OSP. Guerra, a crew boss for OSP, and for the benefit of OSP, was responsible to get his work crew together. Cornejo was in Guerra's work crew. As one of only three of twenty employees on temporary assignment who was allowed by OSP to have his car in Denver, Guerra was also responsible to drive himself and his co-employees back to the OSP-provided apartments (where they were required by OSP to sleep; where OSP kept there work schedules for the next day; and where OSP kept its administrative office, vehicles and equipment necessary for the OSP work). While enroute to these company apartments with Jose Cornejo, Guerra drove his 1985 Volvo station wagon through a red light at the intersection of Havana Street and E. Dartmouth Avenue (in the city and county of Denver, state of Colorado) and collided with a 1995 Nissan Maxima that had entered the intersection from East Dartmouth Avenue on a green light.

22. The occupants of the Nissan, which included the driver, Louis Diep Pham, and the passengers, Kahn Ba Pham, Minh Ngoc Ha, Bang Le, Vu Duy Nguyen, Kieu Trang Thi-Do, (hereinafter "Accident Victim Plaintiffs") were seriously injured in the accident. Louis Diep Pham later died of his injuries.

23. Plaintiff Guerra was an insured under Hartford's Business Auto Policy by virtue of the fact that at the time of the accident 1) Plaintiff Guerra was an employee of OSP; 2) Guerra was operating a covered "auto" (i.e., "any auto"); and 3) the covered "auto" Guerra was operating was his own vehicle and *not one owned, hired or borrowed by OSP in its business or personal affairs*. (See paragraph 17 in this Complaint). Further, Guerra was covered under the Hartford policy in that at the time of the accident he was doing something that related, no matter how remote, to the affairs of OSP. That is, as fully stated above in this Complaint, at the time of the accident, Guerra clearly was doing something (anything) that related to, was connected with, or had any relationship to OSP, Consultants, Inc. Hence, the Hartford policy covered Guerra in his operation of the vehicle that OSP allowed him to use for his benefit and for the benefit of other OSP employees while on temporary assignment for OSP in Colorado; and Defendant Hartford is liable to Plaintiffs for the amount of the judgment against Hartford's insured Guerra by reason of the attached Hartford insurance policy including Hartford's Commercial Automobile Broad Form Endorsement to its policy.

24. Lawsuits were subsequently filed on behalf of the Accident Victim Plaintiffs and Louis Pham's parents (**hereinafter "Parent Plaintiffs"**) against Guerra and his employer, OSP, in Denver District Court. All actions were eventually consolidated into Civil Action No. 96 CV 765; Courtroom 18.

25. Throughout this litigation, Guerra admitted fault. It also has been apparent that the Accident Victim Plaintiffs had sustained serious injuries which required extensive medical treatment and costs. The medical expenses incurred by Louis Diep Pham before his death, alone, exceeded $950,000.00. It was clear throughout the litigation that the combined value of the Accident Victim Plaintiffs' claims and the Parent Plaintiffs' claims far exceeded the available $1,000,000.00 liability insurance coverage that Guerra had with Defendant Hartford.

26. Under the terms of the Defendant Hartford's insurance policy, Defendant Hartford, as an "excess insurer," assumed the responsibility of indemnifying Guerra for claims and judgments against him.

27. Throughout the litigation, the Accident Victim Plaintiffs and the Parent Plaintiffs, through their attorneys, offered to settle all their claims for the amount of Defendant Hartford's liability limits.

28. At all times, Defendant Hartford refused and continues to refuse to tender any amount to the Accident Victim Plaintiffs and the Parent Plaintiffs, even though there was no doubt that Guerra was at fault in the accident and that the damages sustained by the Accident Victim Plaintiffs and Parent Plaintiffs far exceeded Defendant Hartford's policy limits of $1,000,000.00 per accident.

29. Guerra had primary insurance coverage through his own insurance carrier, Allstate, which provided $25,000 liability coverage per person and

$50,000 liability coverage per accident. Allstate also provided a defense to Guerra through Bruce Logan, Esq., an attorney selected by Allstate. On April 8, 1997, Logan requested Hartford, the excess insurer, to indemnify Guerra for the claims submitted against Guerra. (See letter attached as **EXHIBITS "E"** signed by Bruce Logan, Esq.). On Friday, June 13, 1997 Hartford refused to provide this indemnification and stated that there is no coverage for Guerra under OSP's Business Auto Policy. Hartford did not reveal the existence of or even reference the existence of the Hartford's Broad Form endorsement to the policy when it denied coverage to Guerra and instead, in denying coverage, relied on the far more restrictive standard of "course and scope of employment" (a narrow legal term of art) referenced in the Hartford policy.

30. March 9, 1998, Guerra reached a settlement with the Accident Victim Plaintiffs and the Parent Plaintiffs and has assigned to these Plaintiffs his rights to proceed against Hartford on his claims for breach of insurance contract; bad faith breach of insurance contract; and exemplary damages; based on Hartford's refusal to indemnify or extend coverage to Guerra under Hartford's Business Auto Policy or make any attempt to settle the claims made against him by the Accident Victim Plaintiffs and the Parent Plaintiffs, or, in any other way, attempt to protect Guerra, its insured under Hartford's Business Auto Policy and under its Commercial Automobile Broad Form Endorsement as set forth above in paragraph 17 of this Complaint.

31. On May 20, 1998, judgment in the sum of $1,558,707.78, plus interest accruing on the judgment at 9% per annum, was entered by Honorable Phillips of the District Court of the City and County of Denver, in favor of the Accident Victim Plaintiffs and Louis Pham's parents and against Guerra. (**EXHIBIT F**).

32. The purpose of providing liability insurance is to avoid inadequate compensation to victims of automobile accidents. The Judgment entered on May 20, 1998 against Guerra is at **EXHIBIT F** and incorporated herein by reference. The accident victims are third party beneficiaries of the Hartford liability insurance policy. The accident victims attempted to collect on the judgment directly against Guerra; however, the levy was returned as undeliverable. Execution on this judgment was issued and was returned by the Sheriff of Fairfax County marked, "No property found out of which to make a levy." (**EXHIBIT G, and H,** incorporated herein by reference). The accident victims, therefore, file this Complaint to obtain an Order for payment of the Hartford liability limits along with interest, costs, and attorney's fees as allowed under Virginia law and allowed under the Hartford policy.

COUNT ONE
Action on Contract Against Hartford Fire Insurance Company

33. The Plaintiffs restate and reallege paragraphs I through 32 as if set forth herein in full.

34. Guerra is an insured under the Hartford policy. The Accident Victim Plaintiffs and the Parent Plaintiffs

are assignees of Guerra's rights under said policy. Defendant Hartford has breached said contract by failing to perform its obligations pursuant to the contract of insurance and its Commercial Automobile Broad Form Endorsement by purposefully and/or negligently interpreting the policy in such a way as to deny Guerra coverage under said policy and by refusing to indemnify Guerra for claims and judgments arising out of the accident of December 3, 1995.

35. As a result of Defendant Hartford's breach of said insurance contract by failing to provide coverage to Guerra and by failing to agree to indemnify Guerra against any judgment obtained against him, the Accident Victim Plaintiffs and the Parent Plaintiffs vigorously pursued the lawsuit against Guerra, which resulted in Guerra having to continue to require the services of an attorney and prepare the case for trial.

36. As a further result of Hartford's refusal to agree to indemnify Guerra against a judgment, Guerra, through his separate counsel, then reached a settlement on the day of trial, with the Accident Victim Plaintiffs and the Parent Plaintiffs for $1,558,707.78 plus interest at the rate of 9% since the judgment was entered by Honorable Phillips on May 20, 1998.

37. Defendant Hartford's policy had an implied covenant of good faith and fair dealing that Hartford would, in good faith and in the exercise of fair dealing, deal with its insureds fairly and honestly; faithfully perform its duty of representation; and do nothing to

impair, interfere with, hinder, or potentially injure its insureds rights to receive benefits under the Policy.

38. Despite clear language within the Defendant's policy and its broad form endorsement providing coverage to Guerra, Defendant denied coverage to Guerra under the general Hartford policy, concealed the existence of the Hartford Commercial Automobile Broad Form Endorsement when it denied coverage to its insured, Guerra, and further denied that Guerra had a right to be indemnified under the policy, without a reasonable basis for its denial; and Defendant knew that its denial was unreasonable or recklessly disregarded that fact. Defendant Hartford further acted in bad faith by favoring the interest of the insurance company over the interest of the insured.

39. Hartford's refusal to indemnify or extend coverage to Plaintiff Guerra under Hartford's Business Auto Policy and its Commercial Automobile Broad Form Endorsement or make any attempt to settle the claims made against Guerra by the Accident Victim Plaintiffs and the Parent Plaintiffs, or, in any other way, attempt to protect Plaintiff Guerra was done intentionally, willfully and wantonly and made with reckless disregard for the rights and feelings of the Plaintiffs.

40. As a direct result of Defendant's breach of insurance contract, Guerra suffered economic damages including the said judgment against Guerra (for the benefit of the accident victims). As a further direct result of Defendant's breach of contract, the Accident Victims and Parent Plaintiffs have suffered economic losses

including loss of Hartford's policy liability limits, statutory interest thereon since the date of the accident, costs and attorney's fees, as well as non-economic damages such as mental anguish and other non-economic losses including aggravation of their physical injuries, loss of enjoyment of life, and emotional distress. The said economic and non-economic damages of all Plaintiffs are continuing.

WHEREFORE, Plaintiffs pray that this Court grant the following relief:

1. The Court enters a judgment against Defendant Hartford in favor of the Accident Victims and Parent Plaintiffs for the amount of the Hartford liability policy limits of $1,000,000.00;

2. Special damages as proved and allowed by Virginia law;

3. Past and future economic losses including payment to the Plaintiffs of Hartford's liability limits;

4. Pre judgment interests from the date of the accident or from the date of the breach of the insurance contract (as allowed by law);

5. Post judgment interest as allowed by law;

6. Expenses incurred, such as witness fees and attorney fees as allowed by the terms of the Hartford policy and Virginia law; and

7. Such other and further relief as this Honorable Court may deem just and proper, including an Order that Defendant Hartford is liable to Plaintiffs for the full amount of the judgment against Hartford's insured Guerra by reason of the attached Hartford insurance policy with its Commercial Automobile Broad Form Endorsement to the Hartford liability insurance policy.

PLAINTIFFS

By and through their Counsel

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(719) 598-9877
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Foreign Chief Counsel for Plaintiffs

Bruce A. Logan

April 8, 1997

Arlon Stoker, Esq.
Attorneyy at Law
10375 E. Harvard, Suite 403
Denver, CO 80231

Re: *Pham v. Guerra*

Dear.Mr. Stoker:

Enclosed please find a copy of the March 4, 1997 letter to me from plaintiffs counsel, William Muhr, regarding coverage of my client, Erwin Guerra, under the Hartford policy issued to his employer OSP.

With the enclosed correspondence from William Muhr along wiih this letter to you, myclient Erwin Guerra is seeking coverage under the OSP policies issued by Hartford. If coverage is denied, I would request a detailed letter specifying under what exclusions coverage is being denied.

If coverage is accepted, Mr. Guerra will only be looking for indemnity as primary defense and representation coverage is provided under his Allstate insurance policy. At this point, the coverage for Allstate of Mr. Guerra is $25,000 per person and $50,000 per accident. When faced with the five personal injury cases and the wrongful death case, it is clear that his Allstate

coverage will be inadequate should any judgments be entered against him as a result of these cases.

I look forward to your response regarding this correspondence and the request of Mr. Muhr. If you should have any questions regarding the above or the enclosed, please do not hesitate to let me know.

Sincerely yours,

BRUCE & LOGAN
/s/
Bruce A. Logan

BAL/slm
Enclosures
cc: Mr. Erwin Guerra (w/o enc)
Mr. Mark Haas (w/o enc)
William Muhr, Esq. (w/o enc)

THE [picture]
HARTFORD

June 1997

Bruce A. Logan
Attorney at Law
1010 Cherry Tower
950 S Cherry St
Denver CO 80222

RE: Pham v Guerra
Insured: OSP Consultants
Claim Number: 988 AL 43956

Dear Mr. Logan,

I apologize for not writing this sooner: I've been involved in confirming correct policy numbers and forms. The policy that we sent to the plaintiffs is the correct one.

To respond to Mr. Muhr's theory that simply because Mr. Guerra is an employee of OSP he covered under their commercial auto policy even though he is not in course and scope of his employment: As Mr. Muhr points out, "you is defined as the person: or organization shown as the named insured on the declarations page. The dec page in our policy names OSP Consultants., Inc. as the named insurcd. OSP Consultants, Inc. is a corporation. Mr. Guerra is not a corporation. He is not OSP Consultants, Inc. Therefore, "you" does not refer to Mr. Guerra. Followed to its logical conclusion, Mr. Muhr's theory would mean every employee in corporate America is covered by their company's business auto

policy even when they are involved in purely personal activities. That simply defies common sense.

There is no coverage for Mr. Guerra under OSP's business auto policy. We will proceed with a Motion for Summary Judgement. We will also ask for attorney fees since the complaint was amended to bring in OSP after Mr. Guerra's deposition; which made it clear that Mr. Guerra was not in the course and scope of his employment at the time of the accident.

Yours Truly,

Pat McCoy
Claim Litigation Specialist

cc: William W. Muhr, Esquire

Denver Full Service Claim Office
One Denvtr Highlands
10375 E. Harvard Ave., Suite 40
P.O. Box 22315
Denver. CO 80222

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 98-WM-1833

STEVEN PHAM as personal representative of the estate of LOUIS DIEP PHAM, KINH B. PRAM, AND LA T. BUI, natural parents of LOUIS DIEP PHAM, deceased; KANH BA PHAM; BANG LE; MING NGOCHA; VU DUY NGUYEN; KIEU TRANG THI-DO AND ERWIN OVIDID GUERRA,

Plaintiffs,

v.

HARTFORD FIRE INSURANCE COMPANY,

Defendant.

Hartford's Responses to Plaintiffs Interrogatories and Request For Production of Documents

---

Hartford Fire Insurance Company, through its attoneys, Lasater & Associates, P.C.,responds to plaintiff's first set of interrogatories and request for production of documents as follows:

Interrogatories

1. Ms. Cynthia J. Rummel, Esq.

The Hartford
Hartford Plaza, Select Claim - T-6-93
Hartford, CT 06115

Ms. Rummel has reviewed and or contributed to each response.

2. Defendant objects to this interrogatory as it requests information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

3. Defendant objects to this interrogatory as it requests information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. None of the individuals identified had anything whatsoever to do with the claim for coverage beingmade in this case, or the decision by Hartford to deny liability coverage to Mr. Guerra.

4. There are numerous individuals who work at the claims department wino are responsible for handling claims arising out of auto policies. These employees can range from clerical, telephone handlers and processors to adjusters and supervisors and managers, and the nature of the claim depends on which individuals might work on a particular claim. The interrogatory, as is worded, is not specific enough to determine what individuals are being sought for identification. Currently, the adjusters who handle the litigated liability claims are Mr. Jeff Powell, and Ms. Mamie

Donaldson. They are supervised by Mr. Michael Thornkips, and their Claim Manager is Mr. Michael Roy. The addresses of these employees is as stated in the question. Those are the relevant individuals who would conceivably have any handling authority over a case such as this where a claim is made for liability coverage and either accepted or denied.

5. Hartford does not kept a record of all employees who specifically worked in auto liability claims for the past five years, and iss therefore incapable of listing this information. The original adjuster that handled the liability file who has now retired from the Hartford is Ms. Patricia McCoy. Further, Hartford objects to this request as not being reasonably calculated to lead to the discovery of admissible evidence.

6. At this time, Hartford has been unable to determine any telephone or personal contacts between a Hartford employee and Mr. Guerra, other than what has already been disclosed in the underlying civil action filed in Denver District Court. In addition, it is uncertain what is meant by the use of the term "agent". There have been numerous contacts between OSP and attorneys hired by the Hartford. To the extent the term agent encompasses the attorneys, any communication is privileged and not subject to disclosure.

7. The basis for the denial of coverage to Mr. Guerra was because Mr. Guerra was not in the course and scope of his employment at the time of the accident. There is no coverage under the Hartford policy for Mr. Guerra, driving his personal automobile, tthen he ie not acting within the course and scope of his employment. These reasons are morefully set forth in the pleadings and summary judgment filings in the underlying Denver District Court case, and in the filings with the Colorado Court of Appeals. Further, the order from the Denver District Court Judge which found that Mr. Guerra was not in the course and scope of his employment at the time of the accident is further support for and an adjudication of this position.

   A. The initial decision regarding coverage for Mr. Guerra was made by Ms. Patricia McCoy on or around June 13, 1997.

   B. At the time, this was Ms. McCoy's decision, although her supervisor may have been consulted.

   C. The coverage decision was documented by letters to Mr. Bruce Logan, dated May 8, 1997 and June 13, 1997 which were carbon copied to the plaintiffs attorney in thc current case.

8. No statements have been obtained relative to this lawsuit. Any statement obtained relative to the

underlying claim was produced in the underlying suit and in the possession of plaintiffs counsel herein.

9. Defendant objects to this interrogatory as it requests information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, the Hartford Fire Insurance Company: does not keep records which would enable it to determine on an allegation specific basis or on a company specific basis every case that may have been filed under an auto liability, policy, therefore the information requested cannot be determined.

10. Defendant objects to this interrogatory as it requests information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, defendant states that no reserve has ever been set by the Hartford for the claims against Mr. Guerra.

11. Defendant objects to this interrogatory as it requests information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Nevertheless, no reserve has ever been set by the Hartford for the claims against Mr. Guera.

12. Defendant objects to this interrogatory as it requests information which is irrelevant and not

reasonably calculated to lead to the discovery of admissible evidence.

13. As to defenses to this lawsuit, refer to the answer which was filed. In addition, no claims have been "made by insured OSP" (sic) for which a defense needs to be made.

14. This interrogatory is objected to because it is unintelligible. All witnesses have been previously disclosed, and in the underlying case, some deposed. It is unknown what is meant by "limitations on coverage", and the phrase "defenses to Insured's claims known to Hartford Fire` Insurance Company" in the context of the question is nonsense.

15. Noone has been "interviewed" in connection with the bad faith claims brought in this lawsuit, as that tens is commonly defined.

16. Defendant objects to this interrogatory as it requests information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

17. A certified copy of the policy in this case vas sent to the plaintiff's counsel in 1997. This policy included declarations which showed the issue dates. The interrogatory asks "why was the policy changed," however, there is no way of determining from this question what is meant by that statement. Any information regarding a

policy change cannot be determined or responded to unless the plaintiff can identify such a policy change by date or endorsement. Further the additional question regarding "what past claim were made" (sic) is unintelligible, and further, it is impossible to tell from the question what claim is actually being referred to.

18. Ms. Pat McCoy, now Mr. Jeffrey Powell.

A. Writing.

B. Ms. Pat McCoy, liability claims adjuster, address previously stated.

C. Same as B.

D. Mr. Michael Thompkins was Ms. McCoy's supervisor.

E. Ms. McCoy's actions are documented in the correspondence which was copied to the plaintiffs counsel in 1997. It is uncertain at this time whether Mr. Thompkins participated in any of this activity.

F. Only Ms. McCoy conducted initial investigation in Mr. Guerra's claim as it concerned her decision that there was no coverage for Mr. Guerra. Ms. McCoy did rely on her attorney who was defending OSP at the time, to provide her with certain documentation such as Mr. Guerra's

deposition wherein his testimony seemed to make it clear that he was not in the course and scope of his employment at the time of the accident.

G. See D, above.

H. Ms. McCoy reviewed the facts of the accident including the statements made in Mr. Guerra's deposition, she reviewed the policy and correspondence from the attorneys Logan and Muhr.

Request For Production of Documents

1. No liability claim file has ever been created by Hartford relative to Erwin Guerra and that is why none was produced with disclosures and none is produced now. he claim file relative to OSP is in no way relevant to the current litigation, however, the claim file relative to OSP up to the point of litigation has already been produced to the plaintiffs attorney in the underlying litigation in Denver District Court.

2. Hartford may not have any "training and policy manuals" with specific text relating to claims for coverage under liability policies. Hartford is researching this however, and will produce any relevant text if such exists within 20 days.

3. See answer to 1, above.

4. All documents referred to are already in the possession of plaintiff's counsel.

5. Plaintiffs must identify what change they are referring to before any meaningful response can be given to this request.

Respectfully submitted this 9th day of June, 1999.

For the Hartford Fire Insurance Company.

/s/
Cynthia J. Rummel

STATE OF Connecticut)
) ss. Hartford, CT June 9, 1999
COUNTY OF Hartford)

Subscribed and sworn before me by Cynthia J. Rummel, this 9th day of June, 1999.

My commission expires: 01/31/2004

[SEAL]

/s/
Notary Public

Lasater & Associates, P.C.

/s/
J. Scott Lasater, # 16070
8122 SouthPark Lane, Suite 205
Littleton, Colorado 80120
Fax (303) 730-3939 Phone (303) 730-3900
E-Mail: Lasoffice@aol.com

NO. 05-720

In The
Supreme Court of the United States

STEVEN PHAM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS DIEP PHAM, DECEASED, KINH B. PHAM, LA T. BUI, KHANH BA PHAM, BANG LE, MING NGOC HA, VU DUY NGUYEN, AND KIEU TRANG THI-DO,

Petitioners,

v.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief in Opposition to Petition for Writ of Certiorari

Thomas S. Schaufelberger
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STATEMENT OF ISSUE PRESENTED

Should the Court grant certiorari to review an automobile insurance claim involving the application of Virginia statutory and common law?

RULE 29.6 STATEMENT

Respondent Hartford Fire Insurance Company is a wholly-owned subsidiary of The Hartford Financial Services Group ("Hartford Financial"), a publicly held corporation. Hartford Financial has no parent corporation, and no publicly-held company owns 10% or more of Hartford Financial's stock.

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BRIEF IN OPPOSITION

Respondent, Hartford Fire Insurance Company ("Hartford"), respectfully requests that the Court deny the petition filed herein for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

Petitioners ask that this Court grant certiorari to review an unremarkable decision of the Fourth Circuit construing a commercial liability insurance policy issued by Hartford in Virginia to OSP Consultants, Inc. ("OSP"), a Virginia fiber optic installation company.

Petitioners stand in the shoes of an OSP employee who caused an accident while driving drunk in his own personal automobile one Sunday at 2:00 a.m., long after his OSP work shift had ended the previous day. They have sought, under Virginia law, to recover amounts under the OSP Policy, having already exhausted the limits of the employee's own automobile policy.

Petitioners point to no federal issue warranting review of the Fourth Circuit's ruling. They assert that the ruling "conflicts with the decisions of other courts of appeals." (Pet. 10.) However, Petitioners cite in this regard only to decisions construing the law of states other than the one whose law the Fourth Circuit applied in this diversity action: Virginia. Thus, not only is there no federal issue involved here, but there is not even a conflict involving the law of Virginia, whose substantive law is controlling.

For these reasons, the petition should be denied.

COUNTERSTATEMENT

Petitioners were victims in a traffic accident caused by Erwin Guerra ("Guerra"), an employee of OSP assigned to do temporary work in Colorado. After an evening of drinking and dancing during which he consumed 15 beers, Guerra drove his own automobile through a red light at two o'clock on a Sunday morning and collided with a car transporting the Petitioners. Guerra's own automobile insurance responded on his behalf in connection with a resulting civil suit in Colorado.

In that same state court action, Petitioners attempted to hold OSP liable, under a *respondeat superior* theory, for Guerra's conduct. Ultimately, however, that Colorado suit against OSP was dismissed with prejudice because his drinking and driving were found not to be necessarily incidental to his employment, and, therefore, OSP was not liable for Guerra's acts. That decision was affirmed by the Court of Appeals of Colorado. *Pham v. OSP Consultants, Inc.*, 992 P.2d 657 (Colo.Ct.App. 1999).

Petitioners then initiated litigation against Hartford in the United States District Court for the District of Colorado. Standing in Guerra's shoes, Petitioners therein made a direct claim under OSP's insurance policy regarding this accident.

While that federal action was pending, Petitioners instituted this litigation in the Circuit Court for the City of Alexandria, Virginia, and it was removed by Hartford to the United States District Court for the Eastern District of Virginia. (*See* Pet. App. A-15 to A-221.)

Ruling on cross-motions for summary judgment, the District Court held that Guerra was not an insured under OSP's insurance policy concerning the accident at issue because, in using his own private automobile for his private enjoyment during his off-work hours, Guerra was not acting on behalf of OSP. (Pet. App. A-19 to A-20.) Moreover, the

District Court held that Virginia's Omnibus Statute, Va. Code § 38.2-2204, did not apply to OSP's business automobile policy because OSP did not own the car Guerra was driving and because it could not and did not give Guerra permission to use his own car. Contrary to Petitioners' assertions that OSP had somehow permitted Guerra to use his own automobile (Pet. 3 and 7), the Fourth Circuit recognized that "[t]he district court correctly concluded that OSP could not give Guerra permission to drive an auto that it did not own, but was owned by Guerra himself." (Pet. App. A-13 (citation omitted).)

REASONS FOR DENYING THE WRIT

Not only were the matters at issue correctly decided by the Fourth Circuit, but they present no issue of federal law warranting an imposition on this Court.

There is and can be no dispute that Virginia law applied to this insurance coverage action. "The law of the place where an insurance contract is written and delivered controls issues as to its coverage" under Virginia's choice-of-law rules. *Superformance International, Inc. v. Hartford Casualty Insurance Co.*, 332 F.3d 215, 220 (4th Cir. 2003), *quoting Buchanan v. Doe*, 246 Va. 67, 70, 431 S.E.2d 289, 291 (1993), and *citing Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941) (federal court sitting in a diversity-jurisdiction case must apply the choice-of-law principles of the state in which the federal court is located). On this basis, the Fourth Circuit noted that, "[i]n this diversity case, the district court correctly applied the law of Virginia, the forum State and the State in which the contract of insurance was made." (Pet. App. A-6.)

Under Virginia law, the Fourth Circuit found that Guerra was not an insured under the insurance policy of his employer, OSP, for the accident at issue. In using his own private automobile for his private enjoyment during his

off-work hours, Guerra was not acting in any respect in OSP's business or personal affairs; as a result, he was not covered under OSP's policy of commercial liability insurance with Hartford. (Pet. App. A-10 to A-11.) Moreover, Virginia's Omnibus Statute, Va. Code § 38.2-2204, did not salvage Petitioners' claim because Guerra's own automobile—and not one owned or controlled by his employer OSP—was involved in this accident. (Pet. App. A-12 to A-13.)

Petitioners rely on decisions from courts outside the Fourth Circuit in urging this Court to grant certiorari. However, and even without regard to the straightforward legal and factual distinctions between those cases and this one, there is a basic flaw with Petitioners' reliance on those cases: they did not involve the application of Virginia law. Thus, this case presents no disputed issue of federal law and necessarily does not involve a split in applying such law among the circuits. Instead, the case is alleged to involve only different results among federal circuits in cases involving the application of different states' laws.

Moreover, there is not even a "split" among those decisions; their differing outcomes can be explained by different operative facts. While Petitioners cite a few cases which purportedly construed other states' omnibus statutes differently from the Fourth Circuit's construction of Virginia's statute (Pet. 12-22), none of those other cases addressed it in a similar context. In *Western Casualty & Surety Co. v. Herman*, 318 F.2d 50 (8th Cir. 1963) (Pet. 17), a widowed mother who neither owned a car nor knew how to drive but who obtained insurance coverage on her son's automobile was found to have given her son permission to drive the car under the Missouri omnibus statute.

The other cases cited by Petitioners involved something absent here: a business purpose or consent of the vehicle's owner. In *Quinnan v. New Hampshire Insurance*

Co., 97 F.3d 1460, 1996 WL 508654 (9th Cir. 1996) (Pet. 18), the court found omnibus statute coverage where a person was driving his own truck at the request of his employer. *Ridgeway v. Gulf Life Insurance Co.*, 575 F.2d 1026 (5th Cir. 1978) (Pet. 18), similarly involved a named insured who gave permission to driver/owner who was using a truck which the driver had leased to that named insured. The same analysis holds for the remaining cases cited in this regard (Pet. 20-21): *Occidental Fire & Casualty Co. of North Carolina v. Brocious*, 772 F.2d 47 (3d Cir. 1985), *Transport Indemnity Co. v. Paxton National Insurance Co.*, 657 F.2d 657 (5th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), *Chevalier v. Reliance Insurance Co. of Illinois*, 953 F.2d 877 (5th Cir. 1992), and *Carolina Casualty Insurance Co. v. Transport Indemnity Co.*, 488 F.2d 790 (10th Cir. 1973).

Thus, these omnibus statute decisions from other circuits involved neither a federal question nor Virginia law. Moreover, they would not in any event suggest a different result here.

The same is true regarding Petitioners' secondary argument: that Guerra was a direct insured under OSP's business insurance policy. (Pet. 24-25.) Petitioners cite to a Ninth Circuit decision involving California law, *Pacific Employers Insurance Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270 (9th Cir. 1998). However, the Ninth Circuit there made no reference to insurance policy language at issue here which conditioned coverage under the employer's business policy upon its employee's use of a covered vehicle "in [the employer's] business or [the employer's] personal affairs." (Pet. A-9 to A-11.) As a result, *Pacific Employers* cannot be regarded as in conflict with the decision here of the Fourth Circuit.

Petitioners' final argument—that "[n]umerous United States Courts of Appeals have held that an insurer may waive defenses to coverage under a policy upon which it has not

relied in its formal denial of coverage" (Pet. 27)—similarly ignores the fact that Virginia law applied here. Petitioners do not explain why a federal court construing Virginia law should apply the law of waiver from some other jurisdiction.

In Virginia, the coverage of an insurance contract may not be extended by estoppel or implied waiver to include risks not covered by the policy's terms. *Blue Cross and Blue Shield of Virginia v. Wingfield*, 239 Va. 599, 601, 391 S.E.2d 73, 74-75 (1990) ("*Wingfield*") (medical health coverage will not extend beyond the period of time set out in the contract of insurance because to do so would include risks extending beyond the scope of coverage). *See also, e.g., Insurance Co. of North America v. Atlantic National Insurance Co.*, 329 F.2d 769, 774 (4th Cir. 1964) ("it is the general and quite well settled rule of law that the principles of estoppel and implied waiver do not operate to extend the coverage of an insurance policy after the liability has been incurred or the loss sustained," *citing Campbell v. Aetna Casualty & Surety Co.*, 211 F.2d 732, 737 (4th Cir. 1954)); *The Morrow Corp. v. Harleysville Mutual Ins. Co.*, 101 F.Supp.2d 422, 429 n.7 (E.D.Va. 2000) (Virginia law "prohibits the doctrines of waiver and estoppel from being used to enlarge the coverage of an insurance policy").

As found by the Fourth Circuit, Guerra was not an insured concerning this accident and thus was never entitled to coverage under OSP's policy. Based on well-settled Virginia law, the doctrine of waiver cannot be employed to expand coverage beyond that which the OSP policy provided. Accordingly, the doctrine of waiver is unavailing to Petitioners.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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